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No. 16591 Vol 3115

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a Corporation, Appellant,

vs.

HARRY J. McQUEEN, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—11-3-59

No. 16591

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a Corporation, Appellant,

vs.

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Appeal from the United States District Court for the Northern District of California, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

DUNNE, DUNNE & PHELPS,
JOHN MARTIN,

333 Montgomery Street,
San Francisco 4, California,

Attorneys for Appellant.

HEPPERLE & HEPPERLE,
HERBERT O. HEPPERLE,
ROBERT R. HEPPERLE,

1906 Hobart Building,
San Francisco 4, California,

Attorneys for Appellee.

In the United States District Court, Northern District of California, Southern Division

No. 36772-Civil

HARRY J. McQUEEN, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

EXCERPT FROM DOCKET ENTRIES

1957

Sept. 25—Filed complaint — issued summons (demand for jury trial).

* * * * *

Dec. 4—Filed answer of defendant.

18—Filed notice by plaintiff of taking deposition of Custodian of Records, Southern Pacific Hospital & issued subp.

1958

Jan. 8—Filed deposition of Henrietta Roher.

Oct. 15—Filed notice by plaintiff of motion to set, Oct. 20, 1958, with certificate of readiness.

20—Ordered case to bottom settlement calendar. (Murphy)

1959

Jan. 6—Filed notice by defendant of taking deposition of plaintiff.

1959

Jan. 6—Filed notice by defendant of taking deposition of Custodian of Records, S. P. General Hospital & issued subp.

9—Filed notice by defendant of taking deposition of Custodian of Records, Illinois Central Hospital, Chicago.

* * * * *

Jan. 27—Filed deposition of Geraldine Van Orman, Custodian of Records, SP General.

Feb. 3—Filed deposition of Helen Gulis (Custodian of Records Ill. Central Hospital).

4—Ordered case for settlement conference Feb. 6, 1959 at 10 AM. (Harris)

6—Settlement conference. Further conference continued to Feb. 20, 1959. (Harris)

20—Ordered case for trial May 4, 1959, on stipulation. (Harris)

Mar. 19—Filed deposition of Harry J. McQueen.

Apr. 23—Ordered on stipulation of counsel, case off trial calendar and further settlement conference continued to May 13, 1959. (Wollenberg)

May 13—Further settlement conference. Case set for trial June 1, 1959. (Wollenberg)

* * * * *

June 1—Ordered case assigned to Judge Goodman for trial this date. (Wollenberg)

1—Jury trial. Jury impaneled, evidence and exhibits introduced and further trial continued to June 2, 1959. (Goodman)

1959

June 2—Further jury trial. Evidence and exhibits introduced and further trial continued to June 3, 1959. (Goodman)

3—Further jury trial. Evidence and exhibits introduced, arguments heard, jury retired and returned verdict for plaintiff vs. defendant in sum $60,000.00. Execution stayed for 10 days after determination of motion for new trial. (Goodman)

3—Filed verdict.

3—Filed proposed instructions to jury, by plaintiff.

3—Filed proposed instructions to jury, by defendant.

4—Entered judgment—filed June 4, 1959—for plaintiff vs. Southern Pacific Company in sum $60,000.00 & costs. (Clerk)

* * * * *

10—Filed memo. of costs by plaintiff ($191.84).

11—Costs taxed $191.84. (Clerk)

11—Filed notice by defendant of motion for new trial, June 19, 1959 before Judge Goodman.

18—Ordered after hearing, motion for new trial denied. (Goodman)

26—Filed stipulation staying execution and further pleading by defendant to July 18, 1959.

1959

July 16—Filed notice of appeal by defendant.

16—Filed appellant's designation of record on appeal.

17—Mailed notices.

17—Filed supersedeas bond and order staying execution in sum of $70,000.00, "Approved and execution stayed until further order of Court, George B. Harris, United States District Judge."

Aug. 17—Filed reporter's transcript of settlement of instructions, June 2, 1959.

[Title of District Court and Cause.]

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

Plaintiff complains and alleges that:

I.

At all times herein mentioned defendant Southern Pacific Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and that said defendant, at all times herein mentioned, was, and now is engaged in the business of a common carrier by railroad in interstate commerce in the City of Oakland, County of Alameda, State of California.

II.

At all times herein mentioned, defendant was a common carrier by railroad, engaged in interstate

commerce, and plaintiff was employed by defendant in such interstate commerce, and the injuries sustained by him, hereinafter complained of, arose in the course of and while plaintiff and defendant were engaged in the conduct of such interstate commerce.

III.

This action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Section 51 et seq.

IV.

On or about May 29, 1957, at or about the hour of 3:50 p.m., plaintiff was regularly employed by defendant as a brakeman of freight train #X6461W traveling into defendant's West Oakland Yard in the County of Alameda, State of California.

V.

At said time and place it was the duty of plaintiff to be, and he was, riding in the caboose of said freight train.

While plaintiff was in such position, defendant, through its agents, servants and employees other than plaintiff, so carelessly and negligently operated and controlled said freight train as to cause a sudden, unusual and violent slack action between the cars of said train, and as a direct and proximate result of such carelessness and negligence,

plaintiff was violently thrown from his position, and plaintiff thereby sustained the personal injuries hereinafter enumerated.

VI.

Plaintiff so sustained severe physical injuries and endured extreme physical pain and grievous mental anguish. Said physical injuries, so far as are now known, are particularly, although not exclusively, as follows, to-wit: strain and sprain of the cervical spine; recoil injury, cervical spine, with reflex effect into head and shoulder; contusions of the skull and of the brain; injuries to the left arm and left hand; breaking of the teeth; injuries to the ears; loss of equilibrium; and severe shock and injury to his nervous system.

VII.

Prior to said injuries plaintiff was a well and able-bodied man of the age of 63 years, and was earning and receiving from his employment with the defendant a regular salary of approximately $700 per month. As plaintiff is informed and believes and therefore alleges, by reason of said injuries, plaintiff's earning capacity is now, and in the future will be, impaired, all to the damage of plaintiff in the sum of $200,000.00.

Wherefore, plantiff prays judgment against defendant in the sum of Two Hundred Thousand

($200,000.00), and for his costs of suit herein incurred.

HEPPERLE & HEPPERLE,
/s/ HERBERT O. HEPPERLE,
/s/ ROBERT R. HEPPERLE,
Attorneys for Plaintiff.

Trial by jury of all of the issues in the above entitled action is hereby demanded.

HEPPERLE & HEPPERLE,
/s/ HERBERT O. HEPPERLE,
/s/ ROBERT R. HEPPERLE,
Attorneys for Plaintiff.

[Endorsed]: Filed September 25, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now, Southern Pacific Company, a corporation, the defendant above named, and answering the complaint of plaintiff on file herein shows as follows:

I.

Admits as follows:

1. At all times mentioned in the complaint, and herein, defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware and was, and now

is, as a part of its business, engaged in the business of a common carrier by railroad in interstate and intrastate commerce in the City of Oakland, County of Alameda, State of California, and in other parts of the State of California and in other states.

2. On May 29, 1957, at approximately 3:50 p.m., plaintiff was employed by defendant as a brakeman and was a member of the crew of freight train X6461W which was proceeding west at or near the West Oakland Yard in Alameda County, California. At said time and place plaintiff was riding in the caboose of said train. At said time and place an emergency stop was made and said stop caused slack action in said train.

II.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint in respect of plaintiff's conduct, except as hereinabove expressly admitted, or the nature or extent of his injuries, or his age. Defendant denies each and every allegation of paragraphs I, II, III, IV, V, VI and VII of the complaint not hereinabove expressly admitted or denied. Defendant denies each and every allegation of the complaint not hereinabove admitted or denied.

And for a Second, Separate and Independent Answer and Defense to the complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in part I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If plaintiff was injuried at said time and place on said occasion, defendant is informed and believes and upon such ground alleges the plaintiff was negligent in the premises and in those matters set forth in the complaint and negligently conducted himself in and about said caboose and negligently performed his duties as a brakeman. Said conduct of plaintiff, as aforesaid, proximately caused and contributed to the accident, injuries and damages, if any, alleged by plaintiff.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by his complaint on file herein; that defendant have judgment for its costs of suit incurred herein; and for such other, further and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,
DUNNE, DUNNE & PHELPS,
/s/ DESMOND G. KELLY,
Attorneys for Defendant
Southern Pacific Company.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Sixty Thousand Dollars ($60,000).

/s/ WILLIAM A. DREYER,
Foreman.

Filed June 3, 1959, at 2 o'clock and 50 minutes p.m.

C. W. CALBREATH,
Clerk,
/s/ By EDWARD C. EVENSEN,
Deputy Clerk.

[Endorsed]: Filed June 3, 1959.

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY DEFENDANT

The defendant, for whom the undersigned attorneys appear, requests the Court to give the within instructions, and hereby moves that the same be given on submission of the above entitled cause to the jury herein.

Dated June 1, 1959.

/s/ JOHN W. MARTIN,
/s/ A. B. DUNNE,
DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

* * * * *

Defense Instruction No. 6

Contributory negligence in this case is such an act or omission on the part of the plaintiff amounting to want of ordinary care in the circumstances as, cooperating or concurring with a negligent act of the defendant, was a proximate cause of any injury complained of.

Contributory negligence defined.

Defense Instruction No. 7

If the plaintiff, Harry J. McQueen, was guilty of contributory negligence, the damages shall be diminished by you in proportion to the amount of negligence attributable to him. The fact that I instruct you that under the Federal Employers' Liability Act contributory negligence is not a complete defense does not mean that such negligence, where it was present, is to be disregarded. To the contrary, under the rule I have just stated, if there was contributory negligence, it is to be given proper effect by you toward reducing the award.

45 USCA §53; Illinois C. R. Co. v. Skaggs, 240 US 66, 60 L ed. 528; Kansas etc. Co. v. Jones, 241 US 181, 60 L ed. 943.

Damages—contributory negligence.

Defense Instruction No. 8

If plaintiff was guilty of contributory negligence and such contributory negligence is to be given effect under the instructions of the Court, the damages shall be diminished by you in proportion to

the amount of negligence attributable to plaintiff. In such case, the fact that I instructed you that under the Federal Employers' Liability Act contributory negligence is not a complete defense does not mean that such negligence, where it is present, is to be disregarded. To the contrary, under the rule, if there was contributory negligence, it is to be given proper effect by you toward reducing the award in this way. You should evaluate the detriment which resulted to plaintiff without regard to any negligence on his part; you will then consider the negligence, if any, on his part which proximately caused and contributed to his injury and detriment, will compare it with the negligence of the defendant, and will then reduce the damages which you award to the plaintiff in proportion to the amount of negligence, attributable to the plaintiff to the end that the plaintiff himself shall bear the share of his injury and detriment which you find properly attributable to his own conduct.

45 USCA §53; Illinois C. R. Co. v. Skaggs, 240 US 66, 60 L ed. 528; Kansas etc. Co. v. Jones, 241 US 181, 60 L ed. 943.

Defense Instruction No. 9

It is not the design or effect of the statute that contributory negligence is to be given no effect or is to be eliminated from consideration. To the contrary, the design and effect of this statute is "to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury

or an accident responsible for that part of it and to the extent to which they contributed to it." Where recovery is permitted for injury to an employee and he was guilty of contributory negligence, the damages are to be reduced in proportion as the employee's own negligence proximately contributed to bring about his injury and to that extent the defendant is exonerated. If both parties were guilty of negligence which was a proximate cause of the accident, the defendant railroad is responsible only "to the extent to which it was to blame" and the plaintiff is charged with responsibility to the extent to which the employee was to blame and any award, if any is made, can be for only such amount as results after deducting a proportional part of the damages corresponding to the amount of negligence attributable to the employee.

45 USCA § 53; Norfolk & W. R. Co. v. Earnest, 229 US 114, 122, 57 L ed., 1096, 1101; Ill. C. R. Co. v. Skaggs, 240 US 66, 73, 60 L ed. 528, 532.

Defense Instruction No. 10

Contributory negligence is an affirmative defense, and the burden of proof of it rests on the party who alleges it. But in considering this rule, you will bear in mind that, in determining the question of contributory negligence, you must consider the evidence which has been introduced on the plaintiff's case, as well as the evidence introduced by defendant. If the evidence introduced on the plaintiff's case itself shows contributory negligence, a defendant may rely on that evidence without intro-

ducing any evidence. So, also, if the evidence introduced on the plaintiff's case, in conjunction with the evidence introduced by the defense, shows contributory negligence, you must find in accordance with all of the evidence, even though the evidence for the defense, if it stood alone, might not show contributory negligence. In considering the issue of contributory negligence, it is your duty to consider all of the evidence which has been introduced.

Miller v. U. P. R. Co., 290 US 227, 232, 78 L ed. 285, 289; Mautino v. Sutter Hospital Ass'n., 211 Cal. 556, 562; Hoy v. Tornich, 199 Cal. 545, 551; Curtis v. Kastner, 220 Cal. 185, 192; Cook Paint & Varnish Co. v. Hickling, 76 F 2d 718, 721 (Circ. 8).

Contributory negligence—Burden of proof on defendant—But evidence given on plaintiff's case is not to be disregarded.

Defense Instruction No. 11

The plaintiff was under a continuing duty to exercise reasonable care for his own safety at all times. There is nothing in any of the circumstances of this case which suspended that duty, relieved him from performing it or excused a violation of it, if any. The defendant owed him no higher duty to look out for the safety of the plaintiff than he owed to look out for his own safety for the degree of care owed by both plaintiff and defendant was the same. If plaintiff failed to perform this duty he was guilty of negligence.

Rivera v. Goodenough, 71 CA 2d 223, 233.

Defense Instruction No. 12

If the plaintiff was experienced in what he was doing and was in full possession of his faculties, then, in determining what, if any, fault there was on his part, you are entitled to find, if there is no proof to the contrary that he knew and appreciated the necessary, normal and obvious dangers, hazards, and risks incident to what he was doing and the defendant railroad, in the absence of notice to the contrary, was entitled to make and act upon that assumption.

Toledo etc. Co. v. Allen, 276 US 165, 169, 170, 72 L ed. 513, 516; Mo. Pac. R. Co. v. Aeby, 275 US 426, 430, 72 L ed. 351, 354.

* * * * *

[Endorsed]: Filed June 3, 1959.

United States District Court for the Northern District of California, Southern Division

No. 36772-Civil

HARRY J. McQUEEN, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on June 1, 1959 before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues

joined herein: Robert Hepperle, Esq., appearing as attorney for the plaintiff, and John Martin, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on June 1, 2 and 3, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury, and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Sixty Thousand ($60,000.00) Dollars. William A. Dreyer, Foreman", and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Sixty Thousand and No/100 ($60,000.00) Dollars, together with his costs herein expended taxed at $191.84.

Dated: June 4, 1959.

C. W. CALBREATH,
Clerk,
/s/ By MARGARET P. BLAIR,
Deputy Clerk.

Entered in Civil Docket June 4, 1959.

[Endorsed]: Filed June 4, 1959.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named and to His Attorney:

You are hereby notified that on Friday, the 19th day of June, 1959, at the hour of 10:00 a.m. on said day, or as soon thereafter as counsel can be heard, or at such time as the Court may fix, if it does fix another time, the defendant Southern Pacific Company, a corporation, by its attorneys, will move the above entitled Court, the Division thereof presided over by Honorable Louis E. Goodman, a Judge of said Court, at the courtroom of said Court and Division, Room 258, United States Post Office Building, Seventh and Mission Streets, San Francisco, California as follows:

I.

1. For an order agreeably to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting the defendant Southern Pacific Company a new trial. Attached hereto, marked Exhibit "A" and herein incorporated is a draft of the order which defendant proposes.

2. Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial.

3. Said motion will be made upon the following grounds and each of them severally:

(a) The evidence is insufficient to sustain the verdict.

(b) The verdict is excessive.

(c) The verdict is against the weight of the evidence and is not sustained by the evidence in that the verdict is excessive and in that it is excessive the verdict is contrary to the evidence and to the weight thereof.

(d) The verdict is excessive and appears to have been given and was given under the influence of passion and/or prejudice.

(e) Errors of law occurring during the trial.

DUNNE, DUNNE & PHELPS,
/s/ JOHN W. MARTIN,
Attorneys for Defendant.

[Title of District Court and Cause.]

EXHIBIT "A"

ORDER

Southern Pacific Company, a corporation, having duly moved the above entitled Court to vacate and set aside the verdict and judgment herein and to grant to said defendant Southern Pacific Company, a corporation, a new trial, and the matter having been heard and submitted to the Court, and all the parties having appeared upon the making and hearing of said motion, and the Court having considered the same and being advised in the premises, it is

Exhibit "A"—(Continued)

Ordered, Adjudged and Decreed that the verdict and judgment herein be, and they are hereby, vacated and set aside and a new trial of this action is hereby granted to defendant Southern Pacific Company, a corporation.

Done in open court this .... day of ....., 1959.

.....
United States District Judge.

Proof of Service by Mail Attached.

[Endorsed]: Filed June 11, 1959.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 18th day of June, in the year of our Lord one thousand nine hundred and fifty-nine.

Present: the Honorable Louis E. Goodman, Chief Judge.

[Title of Cause.]

This case came on regularly this date for hearing on motion for new trial by defendant.

Ordered, motion for new trial denied.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto and their respective attorneys that plaintiff will not cause execution to issue upon the judgment in the above entitled action until on or after July 18, 1959, and the defendant may have such time within which to file a stay bond or take such other steps as it may be advised.

Dated: June 26, 1959.

/s/ HERBERT O. HEPPERLE,
/s/ ROBERT R. HEPPERLE,
HEPPERLE & HEPPERLE,
Attorneys for Plaintiff.

/s/ JOHN W. MARTIN,
/s/ C. B. DUNNE,
DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

[Endorsed]: Filed June 26, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final

judgment in the above entitled action in favor of plaintiff and against defendant and from the whole thereof being the judgment entered in this action on June 4, 1959.

DUNNE, DUNNE & PHELPS,
/s/ ARTHUR B. DUNNE,
/s/ JOHN W. MARTIN,
Attorneys for Appellant Southern Pacific Company, a Corporation.

[Endorsed]: Filed July 16, 1959.

[Title of District Court and Cause.]

SUPERSEDEAS BOND AGREEABLE TO RULE 73 (d) FEDERAL RULES OF CIVIL PROCEDURE AND ORDER THEREON

Whereas, Southern Pacific Company, a corporation, defendant in the above entitled action is about to, or intends to, appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action in the above named court on June 4, 1959, in favor of Harry J. McQueen, plaintiff, and against Southern Pacific Company, a corporation, defendant, for the sum of Sixty Thousand Dollars ($60,000.00) and costs and from the whole of said judgment; and

Whereas, said Southern Pacific Company, a corporation, as appellant is desirous to staying execution of said judgment so to be appealed from and giving a bond for costs on appeal;

Now, Therefore, Indemnity Insurance Company of North America, incorporated under the laws of the State of Pennsylvania, for the purpose of making and guaranteeing and becoming surety on bonds and having complied with the requirements of the State of California in that behalf, does hereby, in consideration of the premises, undertake and promise, and acknowledge itself bound, in the sum of Seventy Thousand Dollars ($70,000.00) being in excess of the whole amount of the judgment, costs on appeal, interest and damages for delay, that if said judgment appealed from, or any part thereof, be affirmed, or if for any reason the said appeal is dismissed the said judgment will be satisfied in full or will be satisfied as to the part which is affirmed, if affirmed only in part, together with costs, interest and damage for delay which may be awarded and that if payment is not made accordingly within thirty (30) days after the filing of the remittitur from the United States Court of Appeals for the Ninth Circuit or from such other court as may and shall lawfully issue the remittitur in the court from which the said appeal is taken viz. in the United States District Court for the Northern District of California, Southern Division, judgment may be entered in said action on motion of plaintiff and appellee, Harry J. McQueen, and without notice to said Indemnity Insurance Company of North America, a corporation, in his favor against the undersigned surety for said amount, together with interest and costs and any damages which may be awarded against said appellant upon

said appeal and irrevocably appoints the Clerk of said Court as its agent upon whom any papers affecting its liability upon said bond may be served.

In Witness Whereof, the said Indemnity Insurance Company of North America has caused this obligation to be executed by its duly authorized attorney in fact and its corporate seal to be affixed at San Francisco, California, this 16th day of July, 1959.

[Seal] INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
/s/ By RODGER E. HAGEMAN,
Its Attorney in Fact.

(Executed in five (5) counterparts.)

Approved and execution stayed until the further order of court.

/s/ GEO. B. HARRIS,
United States District Judge.

July 17, 1959.

Power of Attorney and Notary's Certificate Attached.

[Endorsed]: Filed July 17, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

fornia, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by attorneys for the appellant.

Excerpt from Docket Entries.

Complaint.

Answer.

Verdict.

Plaintiff's Proposed Instructions to Jury.

Defendant's Proposed Instructions to Jury.

Judgment on Verdict.

Notice by Defendant of Motion for New Trial.

Minute Order Denying Motion for New Trial.

Stipulation for Stay of Execution.

Notice of Appeal.

Supersedeas Bond.

Appellant's Designation of Record on Appeal.

Deposition of Harry J. McQueen.

Deposition of Henrietta Roher (Custodian of Records SP Hospital).

Deposition of Geraldine Van Orman (Custodian of Records SP Hospital).

Deposition of Helen Gulis (Custodian of Records Illinois Central Hospital).

Reporter's Transcript of Trial Proceedings, June 1, 1959.

Reporter's Transcript of Trial Proceedings, June 2, 1959.

Reporter's Transcript of Settlement of Instructions, June 2, 1959.

Reporter's Transcript of Trial Proceedings, June 3, 1959.

Reporter's Transcript of Closing Argument and Instructions, June 3, 1959.

Plaintiff's Exhibits 1, 2, 3, 4 and 5.

Defendant's Exhibits A, B and C.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of August, 1959.

[Seal] C. W. CALBREATH,
Clerk,
/s/ By MARGARET P. BLAIR,
Deputy.

The United States District Court, Northern District of California, Southern Division

No. 36,772

HARRY J. McQUEEN, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

June 1, 1959

Before: Hon. Louis E. Goodman, Judge.

Appearances: For the Plaintiff: Messrs. Hepperle & Hepperle, by Robert R. Hepperle, Esq. For the

Defendant: Messrs. Dunne, Dunne & Phelps, by John Martin, Esq. [1]*

The Clerk: Harry J. McQueen versus Southern Pacific Company, for trial.

Mr. Hepperle: Ready, your Honor.

Mr. Martin: Ready for the defendant, your Honor.

(Thereupon a jury was impaneled and sworn and the case was continued to the hour of 2:00 o'clock p.m.)

Mr. Hepperle: May it please the Court and ladies and gentlemen of the jury:

It is now my duty to make what is called an opening statement in this case. What I have to say is neither evidence nor argument, but it is an outline or preview of the case so that you will be in a better position to follow the evidence as it comes in in the testimony of the witnesses and the various exhibits which his Honor may admit into evidence.

As his Honor indicated this case is the case of McQueen against the Southern Pacific Company. It arises under the Federal Employers Liability Act, which his Honor will tell you about further in his instructions, and it is a case under this Federal law for damages or injuries sustained by Mr. McQueen while he was employed as a brakeman by Southern Pacific Company.

We have sued for damages in the sum of $200,000 here.

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

Mr. McQueen is now of the age of 65 years old. He was 63 when he was injured. He was born May 11, 1894. He has spent [3] all of his adult life as a railroad man, except for a few odd jobs here and there between working for various railroads. He has been employed by Southern Pacific Company since 1943. He worked regularly for them. He has been promoted to the position of conductor and has acted as the conductor of a train when his seniority permitted.

The railroad men work under a seniority system and the man with the greatest seniority has the pick of the jobs.

On the day of this accident, May 29, 1957, Mr. McQueen was working as a brakeman. They had a freight train that was traveling from Roseville to West Oakland. Mr. McQueen's position in the crew was that of rear brakeman; that is, he was the brakeman who worked in the vicinity of the caboose, and he was riding in the caboose at the time of the accident.

The freight train that they had that day was 92 cars long, or consisted of 92 cars. It would be about one mile long in length.

The evidence will show that freight cars are constructed differently from passenger cars in respect of their couplers. In respect of a coupler of a freight car, there is something called "slack" in the coupler, six inches to each end of the car, or one foot of slack for each car in the train. So that this train, consisting of 92 cars, if it were compressed together from the caboose on one end to the engine

on the head end would be 92 feet shorter than if it were stretched [4] as it would be by the engine pulling it on level ground.

Now, most of the freight cars in this train were loaded. It comprised a certain number of tons. There were three diesel locomotive units at the head end of the train, which in themselves weighed some 840,000 pounds.

In the cab of the locomotive, in addition to the engineer and fireman, rode another member of the crew called the head brakeman. So those three men were in the cab of the locomotive. The conductor and Mr. McQueen were in the caboose at the rear end of the train.

As they approached West Oakland, they had entered the yard actually, the speed of the train was somewhere between 6 and 8 miles an hour. Their train was stretched. That is, the action of the three-unit diesel locomotive pulling the train had stretched out those 92 feet of slack in the train.

They had been stopped for a period for a signal, and in the yard at Oakland, the signals are controlled by a man in a tower who flips a little switch and by electrical means the switches are thrown and the signals are changed so as to maneuver trains in and out of the yard.

While they were stopped, immediately before the accident, Mr. McQueen looked out and saw that the stop signal had been changed to a green signal or a "proceed" signal so that the signals were clear for them to enter the rest of the yard to arrive at their final destination. [5]

Mr. McQueen, as a part of his duties, took down the markers from the rear of the caboose—those are the ones that show red to the rear and green to the side to indicate the rear of the train. He had gone into the caboose and had just sat down at the conductor's desk to write a note for the caboose supply man to put some more supplies on the caboose while it was there at West Oakland, and he had only been sitting there in the chair at the conductor's desk for a matter of 30 seconds to a minute or so when, it is stipulated by counsel, a student towerman in the tower negligently flipped a switch which threw the red light or changed the green signal to red immediately in front of the train. And the evidence will show that when that signal was changed to red the engineer had to make what is called an emergency stop by applying the brakes at full application, so that there was a sudden, violent stop of the train, which was particularly violent in the caboose at the rear of the train.

The evidence will show that this sudden, violent stop was caused by the "dynamiting" of the train, as they call it when they apply the air in full emergency; that this sudden, violent stop came with no warning, with no excuse, and that it was completely unexpected by the men in the caboose.

The evidence will show that when a stop like that is made with a train such as is involved in this accident, that the engines at the front of the train, the brakes are applied there first, and then in the cars, going toward the rear of the [6] train, so that the front end of the train makes a complete stop while

the rear end of the train is running in this 92 feet of slack.

So that the evidence will show that when the caboose came to a stop the rest of the train was already stopped, and weighing many, many tons the caboose ran into the balance of the train and it was like running into a stone wall.

The evidence will show that this kind of a stop is called "rough handling" by the railroad men, and it is on that and the negligent changing of this signal from green to red, causing this stop, that we base our action here.

The evidence will show that when this stop was made Mr. McQueen was thrown from his chair, draped over the coal box next to the conductor's desk; that he struck against the grab iron in the process of being thrown; that he hit his head and broke his upper plate, his teeth.

He hit the side of his head, he skinned his ear, he bumped and injured his arm, and he didn't know it at the time, but it was discovered later that he had ruptured an intervertebral disc in his neck so that the ruptured intervertebral disc protruded and pressed upon the spinal cord in the region of his neck there.

The evidence will show that the conductor was also thrown in this accident, but at the time that it happened he had left his conductor's chair while Mr. McQueen sat down in it and [7] the conductor had gone over and sat down on a locker, so that he was thrown to the side. He was facing kind of sideways as far as the direction of movement was con-

cerned, and although he was shaken up, he was thrown sideways so that he himself did not receive any real injury.

After this stop was made, the signal was changed, the engineer pumped up the train line so that the brakes would be released. The train then moved on down another one or two miles to its final destination there in the Oakland yard.

Mr. McQueen and his conductor got off the caboose and went to the trainmaster's office—that is, the conductor went to the trainmaster's office, and right next to it is the Southern Pacific emergency hospital over there at West Oakland. Mr. McQueen went to the hospital, but there was no doctor available there at the time so he came back to the trainmaster's office where the conductor had reported the accident to the trainmaster and had requested medical assistance or attention for Mr. McQueen. The evidence will show that since there was no doctor available there, that the trainmaster telephoned one of the Southern Pacific doctors and by telephone an arrangement was made to prescribe some pain pills to be made available at a drug store.

The trainmaster then in his automobile drove Mr. McQueen to the drug store to get the pills and then drove him to his hotel there in West Oakland. [8]

The evidence will show that Mr. McQueen's condition was getting worse and worse. He took the pills, but he was so rapidly getting worse that he phoned up the yard office and laid off because of his injury, and after getting to his hotel his condition became still worse and he was taken by ambu-

lance to the Southern Pacific Hospital here in San Francisco.

Here X-rays were taken, but there were no beds available in the hospital at that time and Mr. McQueen was sent by taxi to the Ferry Building. By the time he got there, this was about 2 o'clock in the morning so there were no more ferries running. He stayed in a hotel in San Francisco that night, and the next day his condition was such that he had to telephone over to a friend at his hotel to come over here and drive him back to Oakland. Since that time he has been in and out of the Southern Pacific General Hospital as an out-patient on many occasions, and he has also been a bed patient confined to the hospital for some period of time.

There were many tests and X-rays, examinations made. The only treatment that he got at the Southern Pacific Hospital was something in the way of physiotherapy.

Finally, on March 18, 1958, he was discharged from the Southern Pacific General Hospital without what they call a "return to duty" slip. In other words, the doctors discharged him from the hospital but did not give their permission for him to return to work or attempt to return to work. [9]

The evidence will show that at the time of Mr. McQueen's discharge, that under the heading of "final diagnosis," was first entered, "probable posterior column disease, spinal cord, etiology unknown"; and that there was also entered "CNS lues," which means "Central Nervous System lues,"

and the word "lues" is a synonym for the word syphilis."

The evidence will show that both of these diagnoses were wrong or were in error; that first as to the lues or syphilis, there was no history of it. There was an equivocal blood test on one occasion, but the evidence will show that that in itself is not enough for such a diagnosis and that the tests on both the blood and the spinal fluid made before and after were negative; and that, further, the neurological examination was completely negative in that regard and did not substantiate any such diagnosis.

The evidence will also show that the diagnosis of spinal cord disease or degenerative spinal cord disease was also in error.

After Mr. McQueen was discharged from the Southern Pacific Hospital he was seen by a specialist, a neurosurgeon, or sometimes they are called neurological surgeons, a Dr. Nathan Norcross in Oakland. Dr. Norcross had previously examined Mr. McQueen on December 30, 1957, at which time he found that Mr. McQueen had, among other things, a cervical neuralgia, and that he had fasciculations or twitchings in the muscles [10] of the calves of his legs, which the doctor was not able to completely diagnose at that time, but following Mr. McQueen's discharge from the Southern Pacific General Hospital, Dr. Norcross examined him again and had him admitted to Peralta Hospital where, on March 10, 1959, a myelogram was performed.

The evidence will show that the way in which that is done is a needle is inserted into the spinal canal

in the region of the low back and some spinal fluid is withdrawn, and that a radio-opaque material is substituted, and then by means of a fluoroscope and X-rays with the patient tilted back and forth on a table like a carpenter's level, why, this radio-opaque material is maneuvered up to the region of the neck here and X-rays are taken to preserve the appearance seen by the doctor on the fluoroscope, and this myelogram of March 10th indicated that Mr. McQueen had a large ruptured disc in his neck.

Thereafter, Mr. McQueen was operated on By Dr. Norcross at Peralta Hospital where, upon operation, it was demonstrated and seen that this ruptured disc was pressing upon the spinal cord.

The evidence will show that this operation in itself is a major one and a serious one, and that the effect of the operation alone to expose the structure of the neck so as to be able to correct this ruptured disc situation is such as, by itself, to cause the equivalent of a very severe whiplash injury of the neck. [11]

The pressure on the spinal cord was relieved. But the evidence will show that the cells or tissue of the spinal cord do not regenerate. The effect of the operation was simply to stop further pressure upon the spinal cord.

I should say that from the time of the accident up to the operation Mr. McQueen had a great deal of pain and discomfort. In the early period even his vision was disturbed so that looking down at the sidewalk, there was a concave appearance. He had trouble with his balance, and he walked about like

a manikin or a zombie, with his feet wide apart in an attempt to maintain his balance as he would walk. The evidence will show that the reason for that condition was because of the pressure of the ruptured disc upon his spinal cord.

In addition to having trouble keeping his balance and walking in that way, he would have a tendency to stagger as though he had been drinking, although the evidence will show that for many, many years, Mr. McQueen has not drunk anything at all of any alcoholic nature.

He had severe headaches, and the effect of his injury upon him was that he felt addled or rum-dum, as they sometimes say; that he had a feeling of pressure, particularly in the back of his head and his neck, and a pulling feeling in the same area.

That with the passage of time he became terribly distressed, that he had difficulty with his memory, that he [12] had ringing in his head, and that he became so depressed that he had reached the verge of suicide.

The evidence will show that in addition to the twitching of the muscles in his neck caused from this injury, that particularly in the area of the muscles at the base of his thumb was a similar twitching or fasciculation.

Mr. McQueen has been prescribed and has taken pain pills ever since the time of his accident.

The evidence will show that this operation on this disc by Dr. Norcross did prove what the true diagnosis was, that the trouble was coming from this ruptured intervertebral disc, and that it was the

cause of part of the pain and the twitching in the thumb and in the legs, and of that feeling of weight and pressure on his neck and head.

I neglected to state that before the operation he also had an electric sensation where something like an electric shock would run from his neck down his arm to his thumb, and I believe on some occasions some of the other fingers. And he also had a feeling of electric shock from his neck running out to both sides, to the lobes of both ears.

The evidence will show that after the operation that feeling of electric shock down his arm and to both ears was corrected and that in itself does not bother him at the present time.

So that at the present time, the evidence will show that [13] Mr. McQueen is improved by this operation, but that he still is in a condition of total disability. He still requires and the doctors prescribe for him pain pills, No. 3 codeine pills. He finds it necessary to rest. His neck hurts him, particularly on tilting his head back or looking up. He has a feeling of tiredness and ache in his neck and in his shoulders and such a simple thing as using a razor to shave in the morning leaves him all tired out.

He finds that he cannot turn his head as he was able to do before his accident. And as a result of the surgery performed on him he is also having some present difficulty with anemia, for which he is getting treatment from a specialist in that field.

He still has the ringing in his head. It is somewhat difficult for him to hear at times. He finds

that holding up his elbows or elevating his shoulders is some relief to him.

His headache situation has improved. The situation in his legs in the matter of keeping his balance has improved, but he still has some distress in walking and considerable distress when he tires out during the day.

The evidence will show that Mr. McQueen had worked regularly for the Southern Pacific Company. In the past he had sustained a broken toe on one occasion.

Another time he was incapacitated for a while with the flu. Once while working for Southern Pacific he was hit on the [14] head with a rock but lost little time because of it.

As a boy, at about the age of 9, he bumped his head on a timber, on a nail that was protruding, and apparently a part of the head of the nail is embedded under the scalp near the skull bone. However, that has not caused him any difficulty or disability.

In 1955 he had some difficulty with sinus trouble, but after medical treatment it cleared up completely.

His earnings, the evidence will show, from Southern Pacific Company in 1954 were $7,266; in 1955, $7,077; in 1956, $7,385; and in 1957, up to the time of the accident, in January he made $492, in February, $579, in March, $647, in April $742, in May $738, giving him a monthly average for 1957 of $639.96.

Multiplying the monthly average by 12 to cover

the two-year period from the time of the accident up to the present, the wage loss is $15,359.04.

In addition, he has three bills from the Peralta Hospital, one in the sum of $1,359.07, another for lab work of $11.72 and another for lab work of $40.00. [15]

A Dr. Carlton, who did the anesthesia, has a bill of $90.

After the operation, one of these "staph" infections, I believe it is called, set in in the area of the wound, and it was necessary that the wound be reopened and that special isolation technique measures be followed, not only to cure it so far as he was concerned, but to keep it out of the rest of the hospital, and he had to have special nurses during that period. So that there are four nurses' bills of $60, $20, $100, $100, and another laboratory bill of $2. Then Dr. Norcross' fee for performing the myelogram. I think I have made a mistake here. Let me check, your Honor. No, the fee for the myelogram was $50. The fee for the surgery performed by Dr. Norcross, called a laminectomy, was $750.

At the time that the infection set in in the neck, Dr. Norcross was attending a neurosurgeons' meeting, and a Dr. Siefert was the doctor who reopened the wound during that period on two occasions, I believe. His fee or bill in the circumstances is $170, so that the total of the loss of wages and the medical bills is something over $18,000.

At the time of his accident at age 63, Mr. McQueen had a life expectancy of 15.62 years, and at

the present time at age 65, a life expectancy of 14.40 years, according to the 1937 Standard Annuity Table. Mr. McQueen had planned to continue working for Southern Pacific Co., and the evidence [16] will show that there is no compulsory retirement age for a man in his position with Southern Pacific Co. The evidence will show that Mr. McQueen is all through railroading, that that's the only kind of work that he knows, that his spinal cord damage does not regenerate, there is permanent damage there, and that his symptoms have continued as I indicated previously, in brief. So he still has pain and difficulty and disability. And I should mention that one of the unfortunate results of the infection was that it, in itself, caused further scar tissue in the region of the neck, and that in itself is a further cause or source of pain.

When we have concluded the evidence here and his Honor has instructed you, and we lawyers have argued the case, we will ask that you bring in a verdict for a fair and proper sum for Mr. McQueen.

Mr. Martin: May I reserve my opening statement, your Honor?

The Court: Very well.

Mr. Hepperle: Will the man from the hospital come forward, please?

The Court: Well, do you have to go through any rigmarole? You have got some hospital records here?

Mr. Hepperle: Yes, your Honor, and X-rays.

The Court: Why don't you just have them marked in evidence? [17]

Mr. Martin: I have never seen them, your Honor. I would like to have them marked for identification.

The Court: I mean marked for identification.

Mr. Martin: Yes, sir.

The Court: You waive presentation by any persons?

Mr. Martin: Oh, yes.

The Court: Just have them marked.

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Hospital records and X-rays marked Plaintiff's Exhibit 1 for identification.)

Mr. Hepperle: Mr. Murdock, will you come forward, please?

RICHARD M. MURDOCK

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Richard M. Murdock.

Direct Examination

Q. (By Mr. Hepperle): Where do you live, Mr. Murdock? A. Pleasant Hill, California.

Q. Are you appearing here today under subpoena? A. I am. [18]

Q. Are you employed by Southern Pacific Co. as a fireman? A. I am.

(Testimony of Richard M. Murdock.)

Q. How long have you been so employed?

A. Since September 6, 1941.

Q. And since first going to work for Southern Pacific Co., have you taken and passed the examination for promotion to engineer?

A. I have.

Q. And when were you so promoted?

A. December 6, 1952.

Q. Do you recall an accident on May 29, 1957, at about 3:50 p.m.? A. I do.

Q. Were you the fireman on a freight train at that time? A. I was.

Q. Who was your engineer?

A. Bert Armstrong.

Q. Is Mr. Armstrong now deceased?

A. He is.

Q. Were you and the engineer riding in the cab of the locomotive of that freight train?

A. We were.

Q. Did you also have a head brakeman in the cab of the locomotive, a Mr. Kaiser?

A. We did. [19]

Q. Now, just before this accident took place, do you have an estimate as to the speed of the train?

A. About six miles an hour.

Q. State whether or not the slack in the train was stretched at that time. A. It was.

Q. Now, what, if anything, happened in respect of a signal?

A. The indication was changed from green to

(Testimony of Richard M. Murdock.)

red approximately two or three car lengths before we reached it.

Q. And after the signal was so changed to red, what was done?

A. The engineer made an emergency application of the brakes in order to stop short of the signal.

Q. Was such an emergency stop made?

A. It was.

Q. Did the engine stop short of the signal?

A. It did.

Q. Now, having in mind your experience, Mr. Murdock, both as a fireman and as an engineer, can you tell us what the effect of such a stop on a train consisting of 92 cars would be in the caboose?

Mr. Martin: Well, I don't think there is any foundation for that, your Honor. The caboose is 92 cars away. I don't know that this gentleman has ever been in the caboose.

Mr. Hepperle: I can go into further foundation if your Honor desires. I think the experience of the witness [20] himself entitles him to give us an answer here under the decision, since he qualifies in the form of an expert, your Honor, on train operations.

The Court: Well, are you familiar with the effect on a caboose?

The Witness: Yes, I am, your Honor.

The Court: You have been in a caboose?

The Witness: I have. I have ridden in them several times.

The Court: You may answer.

(Testimony of Richard M. Murdock.)

Mr. Hepperle: Will you read the question, Mr. Reporter?

(Record read by the reporter.)

A. (By the Witness): Very violent. Extremely violent. Very much like hitting a rock wall.

Q. (By Mr. Hepperle): Now, as an engineer and a fireman, state whether you have had particular training in the operation of a train to prevent such violent action. A. Yes.

Q. In this instance, when the signal was changed from green to red, state whether or not the engineer was required to make this emergency stop.

A. Under the rules, yes.

Q. And if he passed the signal, state whether or not he would *have subject* to discipline. [21]

A. He would.

Q. State whether or not upon final arrival at Oakland you were notified of the injury of Mr. McQueen. A. We were.

Q. And did you make out a Southern Pacific Form 2611 Accident Report at that time?

A. Yes.

Q. Have you ever been contacted since by anyone of the Southern Pacific Law or Claims Department about this accident? A. No.

Mr. Martin: I don't believe that is material, your Honor. We have stipulated the stop was made. That isn't negligence.

The Court: Well—This is all of the witness?

Mr. Hepperle: Yes, your Honor.

The Court: You wish to ask any questions?

(Testimony of Richard M. Murdock.)

Cross Examination

Q. (By Mr. Martin): Mr. Murdock, just one thing. Do I understand there were three units of diesel on this train? A. There were.

Q. And of course you and the engineer would be riding in the leading unit?

A. In the lead unit.

Q. That's where the controls are for the whole train, is that correct, sir? [22]

A. That is true.

Q. And the other two units, would they?

A. In this case they were.

Q. Yes. And your run was from Roseville to Oakland, is that correct?

A. Roseville to West Oakland.

Q. And where in West Oakland would your terminus or terminal be?

A. You mean where the train finally stopped?

Q. Where you would stop the train and the crew would get off.

A. Well, it would be at the West Oakland Yard. Not the desert unit, the West Oakland Yard. I can't recall the name of the street where it ends at, but it is the West Oakland Yard.

Q. I see. Did this occurrence take place shortly before you had completed your run? A. Yes.

Q. Would it have been within a couple of miles of where you——

A. Yes. I would say between one and two miles.

(Testimony of Richard M. Murdock.)

Q. I see. So therefore, I take it that it occurred within yard limits, is that correct?

A. It did occur within yard limits.

Q. And it occurred in daylight, did it? [23]

A. It did.

Q. About what time of day was it?

A. I believe 3:50 in the afternoon.

Q. And Mr. Murdock, the brake mechanism of that train is controlled in what fashion? What kind of a——

A. Well, the engine brakes are separate from the—they have an automatic brake valve that controls brakes on every wheel of the train, the automatic brake valve controls.

Q. To shorten this up, do you have an air line that runs through the entire train?

A. We do.

Q. And each car in that train has its own air brakes? A. It does.

Q. And by a lever in the engine, you can, by means of exhausting air throughout the train, apply the brakes in each car in the train?

A. Very true.

Q. And when you apply the brakes, not only in emergency but in any situation, that is how it works: The brakes set up on every car?

A. It is the principle.

Q. And do those brakes apply simultaneously or do they apply from the head end first?

A. They apply from the head end first.

Q. And when the application, as I understand

(Testimony of Richard M. Murdock.)

it, is made [24] by exhausting the pressure—is that right?

A. That's right, venting the pressure.

Q. Venting the pressure? Do I understand that you have, in the course of your duties, had considerable experience riding in cabooses?

A. Not considerable experience; we deadhead in cabooses a number of times.

Q. I see. Isn't it true, sir, that when the air is applied in a train, you can hear the escaping of the air from the caboose?

A. I don't ever recall that.

Q. You do not recall that? Did you ever make any note of that? A. I never did, sir.

Q. You never made it a point to observe that?

A. You can hear the brake shoes applied on the wheels, the grinding noise, but you don't hear the air vent.

Q. Can you hear the air brakes applying or being set up on the cars ahead of you?

A. In an emergency application, sir, you can actually hear the AB brake valve vent. They go "Pow!", like that.

Q. I see.

A. And in a case of an emergency. In the case of a service application, they do not. There is no venting noise whatever. [25]

Q. Well, then, we will take an emergency application. There is a vent that makes a noise, is that right?

A. There's an AB valve, and in an emergency,

(Testimony of Richard M. Murdock.)

every car has an emergency cylinder that vents the air and allows the cylinders a full run, in other words.

Q. And when that occurs in emergency application, that is when the air is completely exhausted as rapidly as possible,——

A. As rapidly as possible. The term is "a big hole," in the railroad.

Q. It makes a noise which can be heard inside the caboose, is that correct?

A. You should be able to hear the AB go then, in the case of emergency. Not in the service application; there's no noise involved, only the grinding of the shoes on the wheels.

Q. The application here was emergency, wasn't it? A. It was an emergency application.

Q. And what do you do? Do you hear them popping off ahead of you before they hit you?

A. Almost simultaneously; not quite.

Q. I see. And then I take it that the slack action you speak of occurs when the cars in front are banging up against one another, is that right?

A. That is true.

Q. So the first car would bang up against the engine, the following car would bang up against that, and all the way down the line for 92 cars, is that right? A. That's right. [26]

Q. And of course that takes much longer in time than for the exhaustion of air to the emergency brake, is that not true?

A. Yes, it would take a little longer perhaps.

(Testimony of Richard M. Murdock.)

Q. When you drop brake pressure at the head end of a train by means of an emergency application, the drop in pressure travels approximately at the speed of sound, does it not?

A. Well, I wouldn't be an expert on exactly how fast it went on that.

Q. But it is quite rapid, isn't it?

A. It would be quite rapid.

Q. Whereas the mechanical banging up of the cars, of course, is much slower, is it?

A. Yes, it would be slower.

Mr. Martin: I think that's all. Thank you.

Redirect Examination

Q. (By Mr. Hepperle): In the case of an emergency stop with a train of 92 cars, is there any warning sound in the caboose before the caboose stops?

A. In the case of an emergency application?

Q. Yes.

A. There's a possibility, as I said before, that you might hear the AB brakes go.

Q. And state whether or not that would be simultaneous with the stop of the caboose. [27]

A. That's a difficult question to answer.

Q. Would it be almost simultaneous?

A. Almost.

Mr. Hepperle: That's all.

The Court: That's all.

(Witness excused.)

Mr. Hepperle: May Mr. Murdock be excused, your Honor?

The Court: Very well.

Mr. Hepperle: Mr. Ward, will you come forward, please?

EUGENE B. WARD

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: My name is Eugene B. Ward.

Direct Examination

Q. (By Mr. Hepperle): Where do you live, Mr. Ward?

A. I live in Orangeville, California. That's near Folsom.

Q. And are you appearing here today under subpoena? A. Yes, I am.

Q. Are you employed by Southern Pacific Company? A. Yes, I am. [28]

Q. How long have you been so employed, and in what capacity?

A. Since 1930 as a brakeman and since 1942 as a conductor.

Q. On May 29, 1957 at 3:50 p.m., were you the conductor on a train entering West Oakland?

A. I was.

Q. And did that train consist of 92 cars and the cars themselves weigh 4,063 tons?

(Testimony of Eugene B. Ward.)

A. That's correct.

Q. Now, immediately before this accident, or let's not say "immediately before," but on various occasions before the day of this accident, had you worked with Mr. McQueen?

A. On a few occasions; not too many times.

Q. Had you, while working with him, observed him perform his duties and noted his general appearance? A. Yes.

Q. What was his appearance before this accident, so far as his physical condition and health were concerned?

A. Well, he appeared to be in good health and in good spirits. I couldn't see anything different than any other time that I have been with him.

Q. Now, taking the period immediately before this accident, had you yourself practically finished making out your reports?

A. I had completed the biggest part of the reports and the rest would be finished in the office.

Q. And what position did you occupy when you were filling [29] out your reports?

A. Well, I would be sitting in a chair at the desk, facing the wall on the south side of the caboose.

Q. And is that desk and chair provided for that very purpose, of the conductor making out his reports? A. It is.

Q. Immediately before the accident, had you left your position at the desk?

A. I had finished my reports that I had at that

(Testimony of Eugene B. Ward.)

time and moved across on the west side of the caboose and sat on a locker.

Q. What, if anything, did Mr. McQueen do at that time?

A. Well, after I had moved, Mr. McQueen had a few chores to do like taking down the markers and various other things. Then he decided that it was necessary to leave a note for the caboose supplyman to place new supplies on the caboose while it was in the yard.

Q. And did Mr. McQueen begin to write such a note?

A. Yes, he sat down at the desk and picked up a pencil and commenced writing.

Q. How long had he been in that position before the accident took place?

A. Well, I would say not more than—less than one minute.

Q. Immediately before the accident, what in your estimation was the speed of the train?

A. I estimated the speed at seven miles per hour.

Q. Now tell us what happened when the accident took place.

A. Well, those things happen so suddenly that you don't have time to think hardly. It's almost an instantaneous happening.

The Court: Well, he wants you to tell us what happened.

The Witness: Well, it threw me violently over on my right side.

The Court: He wants to know what happened.

(Testimony of Eugene B. Ward.)

The Witness: Oh, I see. Well, I heard the air, the tripping valve make this peculiar hissing sound that they make when all the air is reduced, and then came the impact right following it, almost immediately.

Q. (By Mr. Hepperle): Now state whether or not the stopping of the caboose was violent.

A. Well, it was very violent.

Q. From the time that the caboose was traveling, according to your estimate, seven miles per hour to the complete stopping of the caboose, what kind of a time interval was there?

A. Well, from the time that you hear this air valve tripping, it is just a matter of a split second before the impact, before we were thrown down.

Q. State whether or not there is any warning, or was there any warning on this day of this violent stop?

A. No warning at all. This happens almost instantaneous. [31]

Q. Now, with respect to you yourself, state whether you were thrown.

A. I was thrown over on my right side onto the ladder.

Q. State whether or not there is a cushion or pad on that locker?

A. There was a cushion. I was sitting on the long cushion and it broke my fall.

Q. With regard to the impact or the violence of this stop, state whether you have ever experienced a more violent stop than this one.

(Testimony of Eugene B. Ward.)

A. Well, I have experienced lots of those stops and at that speed and at that particular time I don't believe I could say that I ever experienced a more violent stop.

Q. State whether or not this stop constituted rough handling of the train.

A. Well, yes, it would.

Q. What, if anything, did you notice with respect to Mr. McQueen when this violent stop took place?

A. Well, I was sitting directly behind him, facing his back, and he was thrown out of the chair that he was sitting in over to the right against the coal box. It protrudes a way out from the desk and he was crumpled up into this coal box when I picked myself up and was able to give him some assistance.

Q. What was his appearance at that time?

A. Well, of course he had his back to me, but he had all [32] the indication that, as hard as he struck the coal box, that he must have been injured severely.

Q. As you went to his assistance, did he make any complaints of pain or discomfort?

A. Yes, he stated that his right arm was hurting him, also his right side and his false teeth were broken; they had come out of his mouth. They had split right down the middle.

Q. After the accident, did the train then move on into its final destination in the yard?

A. Yes, it did.

(Testimony of Eugene B. Ward.)

Q. And did you and Mr. McQueen then leave the caboose? A. Yes.

Q. And where did you go?

A. I immediately went to the office. I dropped off the caboose; it was still moving; as it passed the office. I dropped off and went into the office and delivered the bills that I had of the train, the manifest bills, and proceeded immediately to the train master's office.

Q. Did you report the accident at that time?

A. I entered the train master's office and asked for the train master in charge. There was two men——

The Court: All he asked you, sir, was, did you make a report.

The Witness: Oh, yes.

Q. (By Mr. Hepperle): And did you request medical [33] assistance for Mr. McQueen?

A. Yes, I did.

Q. Were you informed that no doctor was available there at the West Oakland Emergency Hospital? A. That's right.

Q. Was an arrangement made by telephone to obtain pain medicine for Mr. McQueen and for the train master to drive him over to receive it?

A. Yes.

Q. Before you left there, did you make out a Southern Pacific 2611 accident form report?

A. I did, yes.

Q. Now, after the train master drove Mc-

(Testimony of Eugene B. Ward.)

Queen away, did you meet him later on that afternoon or evening? A. Yes.

Q. And state whether or not he complained of pain at that time. A. Yes, he did.

Q. And what, if anything, did you note as to his appearance at that time?

A. Well, he was in a very, very nervous condition and complained of these hurts that he had.

Q. Did you later go with him to his hotel?

A. I did.

Q. And did you do anything about leaving instructions [34] with the hotel manager?

A. I did.

Q. For medical assistance? A. I did.

Q. What did you do in that respect?

A. I talked to the hotel manager and told him that in my opinion the man needed medical attention and, if he would, he might look in on him and, if necessary, to call someone to provide medical attention for him.

Q. Did you the next morning learn that Mr. McQueen had been taken by ambulance to the Southern Pacific Hospital? A. Yes.

Q. In the afternoon or evening of this accident, —did you next see Mr. McQueen at my office on May 28 of this year, 1959? A. That's correct.

Q. Have you since the time of the accident ever been contacted by anyone from the Southern Pacific Claims or Law Department about this accident?

(Testimony of Eugene B. Ward.)

Mr. Martin: Objection to as immaterial, your Honor.

The Court: Sustained.

Mr. Hepperle: We think it is material, your Honor——

The Court: Oh, it doesn't make any difference whether they contacted him or not. It has no effect upon their responsibility for the accident.

Mr. Hepperle: That is all. [35]

Cross Examination

Q. (By Mr. Martin): Mr. Ward, do I understand that you were seated on a locker at the time of this occurrence?

A. Would you please repeat that?

Q. Excuse me. I have a bad cold and I may have trouble being heard.

Did I understand that you were seated on a locker at the time of this occurrence?

A. Yes, that's correct.

Q. And were you seated so that you were facing in the direction of the motion of the equipment, or were you faced at right angles to the direction of the motion?

A. At right angles to the direction of the movement.

Q. Were you facing out or inboard?

A. I was facing across to the opposite side of the caboose.

Q. Was Mr. McQueen on the opposite side from you? A. Yes.

(Testimony of Eugene B. Ward.)

Q. And was he nearer the head end or the rear end from where you were sitting?

A. I believe, in remembering it, that I must have been approximately two or three feet toward the rear of the caboose from where he was sitting.

Q. And there was nothing between you, was there, to interfere with your vision? [36]

A. Nothing.

Q. And is this locker that you were sitting on—do I understand it is padded?

A. It has a regular locker pad on top of it approximately three inches thick.

Q. And is it padded at each side as well?

A. Not on the side. It is a long flat pad and you—it was stretched out flat on top of the locker.

Q. Oh. Is it something a man can lie down on?

A. If you are so inclined.

Q. I see. But I take it, then, that you were seated on this thing, is that right? A. Yes.

Q. And is there any—On your right-hand side, for instance, what is there, a partition of some kind?

A. No.

Q. Oh, there's nothing at all there?

A. Nothing.

Q. Except the end of the caboose?

A. Well, I would say from where I was sitting, ten feet toward the head of the caboose, there was a locker provided there for different things. In other words, the locker did not run clear to the caboose; only partially.

(Testimony of Eugene B. Ward.)

Q. Did you strike anything as a result of this collision?

A. No, I didn't, except I fell over sideways. [37]

Q. In other words, you went over sideways on the mat, is that right?

A. Over on my side onto the cushion.

Q. The cushion, pardon me. Did it knock you off your seat? A. I was sitting down.

Q. Well, did it knock you down to the floor?

A. Not on the floor, no; over on the locker.

Q. And I take it, then, that you struck nothing but the pad which you had been sitting on, is that right? A. That's correct.

Q. Was this a wooden caboose?

A. I believe so. I believe it was a wooden caboose, inside and out.

Q. The type with the cupola up on top?

A. That's right.

Mr. Martin: I think that's all I have.

Mr. Hepperle: That is all. May Mr. Ward be excused, your Honor?

The Court: He may be excused.

(Witness excused.)

The Court: We will take a brief recess at this time, ladies and gentlemen.

(Recess.)

Mr. Hepperle: We offer in evidence, may it please [38] the Court, the Southern Pacific Hospital records and X-rays.

The Court: Do you have them here?

Mr. Hepperle: Yes. I have just handed them to the Clerk, your Honor.

The Court: They may be marked for identification and either side can use whatever he wishes from them, if that is satisfactory.

Mr. Hepperle: Yes. Couldn't they go into evidence?

Mr. Martin: As I understand the procedure in this court through past experience, it is the procedure of the court that they don't go in evidence; they are simply marked for identification and either side can use them.

The Court: Yes, that is what I have done in the past. They are marked for identification and either side can use whatever they want to.

Mr. Hepperle: Perfectly fine, your Honor.

The Court: Plaintiff's Exhibit 2 for identification.

(S. P. Hospital records and X-rays of McQueen were marked Plaintiff's Exhibit 2 for identification.)

Mr. Hepperle: And we also offer in evidence a list of the earnings and a group of medical bills in this case.

The Court: Any objection to that?

Mr. Martin: May I see that? I understand the [39] earnings for the year are gross earnings without deduction for tax?

Mr. Hepperle: That is correct.

Mr. Martin: With that understanding, there is no objection.

The Court: All right.

(List of earnings and group of medical bills of Mr. McQueen, were received as Plaintiff's Exhibit 3 in evidence.)

[See page 183.]

Mr. Hepperle: Mr. McQueen, will you come forward, please?

HARRY J. McQUEEN

the plaintiff herein, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Harry Joseph McQueen.

Direct Examination

Q. (By Mr. Hepperle): Where do you live, Mr. McQueen? A. At 1635—7th Street, Oakland.

Q. How old are you at the present time?

A. Sixty-five on May 11th.

Q. When and where were you born?

A. At Huron, Indiana, May 11, 1894.

Q. Are you a high school graduate? [40]

A. Yes.

Q. Have you for your adult life, with the exception of a few odd jobs, spent your employment in railroading? A. I have.

Q. When did you begin working for Southern Pacific Company? A. 1943.

Q. Were you later promoted to conductor?

A. Yes, I was.

(Testimony of Harry J. McQueen.)

Q. And did you, when your seniority permitted, work as a conductor for Southern Pacific Company?

A. Yes, always.

Q. Do the job opportunities available to a man depend upon his seniority?

A. Could I have that again, please?

Q. Do you have the seniority system for conductors and brakemen? A. Yes.

Q. And does the man with the greater seniority have the choice of the jobs available?

A. Yes, he does.

Q. On May 29, 1957, were you involved in an accident? A. Yes, I was.

Q. Taking the time immediately before it occurred, were you and Conductor Ward riding in the caboose of a freight train entering the Oakland yards? [41] A. Yes.

Q. What did you do immediately before the accident happened? A. Before?

Q. Yes. A. Immediately?

Q. Yes.

A. Well, I was sitting at the desk.

Q. Taking a point a little bit before that, had your train come to a stop?

A. Yes, the train had come to a stop.

Q. And what, if anything, did you note at that time with respect to signals?

A. Well, the signals were red.

Q. Then did you later notice that the signals were cleared for your train? A. Yes.

(Testimony of Harry J. McQueen.)

Q. Does that mean they were turned from red to green? A. Green and yellow.

Q. Did your train then start up again?

A. It started up. I don't know just how long we were there.

Q. What, if anything, did you do from that point on, would you tell us?

A. Well, as soon as we got the signals and the train [42] started, I, as a habit, checked through the cupola. I checked the signals, that they were in proper condition, which was green, and the farther signal was yellow. That is still a clear signal. Then I took my markers, locked the cupola and got down below.

Q. When you say "the markers," is that those little lights that hang on each side of the rear of the caboose?

A. It designates the rear end of a train.

Q. Immediately before the accident, what speed, in your estimation, had the train attained?

A. Well, I should say eight miles an hour. You can never determine that. Seven or eight miles an hour.

Q. State whether or not your train was stretched at that time? A. Yes, it was.

Q. Now, we have had some mention of slack action but, in order to have a record from a witness, is there a certain amount of slack for each railroad car in a freight train?

A. Yes, you are allowed six inches on each car.

Q. Does that then mean six inches to a car?

(Testimony of Harry J. McQueen.)

A. Six to a car. That would be a foot between the two cars.

Q. Then that would be one foot for each car, having in mind a coupler on each end?

A. Yes. [43]

Q. Now, did there come a time when you sat at the conductor's desk?

A. Yes, I sat there at the conductor's desk.

Q. What was your purpose in sitting down there?

A. Well, it was my place to make out a slip order for supplies to the caboose man. That is, the caboose man, when the caboose got into the goose track, the caboose man was to fill my order.

Q. How long had you been sitting there before the accident happened?

A. Well, I couldn't just say exactly. I hadn't no more than got sat down. Maybe a minute or something similar to a minute. I don't know definitely the time. Very short.

Q. What happened when the accident took place?

A. Well, when the accident took place—I can hardly explain all of it, only I know there was an accident and all at once I was against the coal box, and I found later that I had hit my arm and head and injured myself.

Q. Now, you have mentioned being against the coal box. State whether or not you were thrown from your position in the conductor's chair.

A. Yes. The coal box constitutes the end of the desk, built in.

(Testimony of Harry J. McQueen.)

Q. Tell us what kind of a stop your caboose made at the time of the accident. [44]

A. Well, it was just now, just right now stopped.

Q. State whether or not it was violent.

A. Yes, it was violent, very violent.

Q. Was it an expected stop? A. No.

Q. Did you have any warning that such a stop was to be made? A. None whatever.

Q. Was this a normal or a usual stop?

A. No.

Q. How did you feel after the accident took place?

A. Well, I don't know how to put it. I was just sort of rum-dum and shook up and—I don't know just how to explain it all. I knew I was hurt, but as far as the extent of the injury, I don't know.

Q. Did you notice anything in relation to your teeth? A. Yes, my teeth were broken.

Q. And how about the right side of your face and ear?

A. Well, there was an abrasion, or abrasions, on the right side of my face from hitting the coal box. I presumed it was the coal box because that was the only thing I could have hit, the edge of it.

Q. And what about the condition of your right arm?

A. Well, presumably the right arm struck the grab iron. There is one on each side of the desk to hold to if you get a warning. There is a grab iron here (indicating) that I can [45] reach just like that and there is a similar one up on the right

(Testimony of Harry J. McQueen.)

side here (indicating). I went to that one because the stop was made that way.

Q. Did you have any trouble with your thumb at that time? A. I don't get that.

Q. Did you have any trouble with your thumb or your hand?

A. Yes, I hit my arm and in some way in the accident I was bent over and the thumb was injured. How, I don't know. It was a twist; I naturally supposed it was when the arm hit the grab iron. The force was so great that I kept going up against the desk and hit my thumb or mashed it with my body. I don't know how it was.

Q. We have covered with Mr. Ward the matter of your train then completing its journey and coming to a place where you went to the yard office and emergency hospital. How did you feel at that time, Mr. McQueen?

A. Well, I just can't explain that. I had difficulty dismounting and, in getting off the caboose, you have to get off a caboose while it is going in order to get off at the yard office, and we dismounted at the yard office, which was the practice, and I had the brakeman or somebody went around there with me. I wasn't just clear on what was going on, what I was doing, that is, to the extent of how I was hurt or anything else.

Q. Did you seek medical attention there at the emergency [46] hospital?

A. Yes. No one there.

Q. You say no one was there?

(Testimony of Harry J. McQueen.)

A. No one was there.

Q. What did you next do?

A. Well, the only thing left was to go back to where the conductor was and the train master to see what disposition they was going to make, and send for a doctor. [46-A]

Q. We have covered through Mr. Ward the matter of the trainmaster telephoning the doctor and then driving you to the drugstore for pain pills and then to your hotel. How did you feel by the time you got to your hotel?

A. Well, I was still sort of in a daze. I don't know. I was just all shook up. I don't know how to explain just how I did feel, only I wasn't feeling normal by a long ways.

Q. With the passing of time did you get better or did you get worse? A. I got worse.

Q. Did you telephone in to lay off from your job? A. Yes, I did.

Q. Later, was an arrangement made to send you to the Southern Pacific Hospital in San Francisco?

A. Through my assistance, yes.

Q. And was that later on that evening?

A. Around 12:00 o'clock midnight.

Q. How did you come to the Southern Pacific Hospital here? A. Ambulance.

Q. And what was done for you at that time at the hospital?

A. X-ray pictures, and I took a dose of my own medicine, and that's all.

(Testimony of Harry J. McQueen.)

Q. Is that the same medicine the doctor had prescribed over the telephone?

A. That's right. [47]

Q. Did you stay at Southern Pacific Hospital?

A. Yes, I stayed there until they got the X-rays taken, and then bundled me up in a taxicab and sent me down to the pier to go home, but there was nothing going until around 6:00 o'clock.

Q. Did you then go to a hotel?

A. Yes, I did.

Q. What was your condition the next morning?

A. Well, it was—I don't know. I felt like going back to the hospital, I was feeling so bad, but then I knew they wouldn't let me get in there, so I went and called up the hotel and made arrangements for somebody to come over and get me. I never felt like riding a street car or anything like that.

Q. Did you then, with the passage of time, report on various occasions as an out-patient to the Southern Pacific General Hospital?

A. When required.

Q. And were there other periods when you were kept there as a bed patient? A. Yes.

Q. Now, we have mentioned the matter of an operation this year. Taking your condition from the time of the accident up to the time of the operation, will you tell us what bothered you and in what respect?

A. Well, I had lost my sense of balance, and then there [48] was a ringing in my ears and a sensation into my arm, it was swollen, and I couldn't

(Testimony of Harry J. McQueen.)

walk. I would start out and be going along for a couple of steps and I would have to go to the right and then I would have to go to the left to right myself, and that continued up until the time I was relieved from it by the operation.

Q. Taking the matter of your balance again, state whether or not you staggered at times.

A. Yes, I did.

Q. Now, for a period of years had you refrained from drinking any alcoholic beverages?

A. Yes. None whatever.

Q. What did you do to try to keep your balance when walking, with your feet?

A. Well, I had to brace my feet. Every time I made a step I would have to, just a natural inclination to protect myself, because it was sort of like a dizziness that I was going to go this way or was going to fall, so when I would step I would use the inside of my feet to hold my balance.

Q. What was your condition with respect to headaches?

A. Well, from the accident I had continual headaches and been taking the limit of strong medicines that they gave me. Just aspirin or something like that won't relieve it—wouldn't relieve it any.

Q. What part of your head did you have the headaches in? [49]

A. It was on the back of my head, up in here (indicating), in the back and the top. Well, not the top. In through here (indicating).

(Testimony of Harry J. McQueen.)

Q. What was your condition with respect to your neck?

A. Well, the neck, that seemed to be where the trouble all started, in my neck. There was a sort of a tension, like something was pulling me or pushing me. It was all in the back in here, with an exceedingly lot of pain with it at all times and distress.

Q. With the passing of time were you cheerful or otherwise? A. How is that?

Q. Were you cheerful? Were you in good humor? Did you feel good?

A. Well, I tried to pretend I was, but I wasn't. I tried to keep in as good humor as I could, but I was depressed all the time.

Q. State whether or not you found it necessary to rest. A. Yes, I did, always.

Q. Did you note anything with respect to your memory?

A. Well, I just can't remember. My memory is not what it was when I got hurt. I just don't know, I can't remember past dates and incidents that have happened that in the usual procedure I would remember everything.

Q. Did you have any trouble with your vision?

A. Yes, I had trouble just after I got hurt. It was, well, [50] on the left of me and it appeared like a concave or like a ditch in the sidewalk, or wherever I happened to be going.

Q. Did you notice anything with respect to moving objects?

(Testimony of Harry J. McQueen.)

A. Yes. I couldn't cross the street and put my eyes on an object. If I put my eyes on an object, why, I would sort of fall over. If I would see an automobile, like there was someone in it and I would try to follow them like that with my eyes, I would get over-balanced.

Q. Did you have any trouble with the muscles at the base of your thumb? A. Yes, I did.

Q. Tell us about that, please.

A. Well, they twitched just like an electric shock in there, and I had a dead sensation where I struck my arm down here, and the sensation would go out into this part of the thumb here. It was visible. It would just tremble at all times through the whole two years. And the other one would come to here and would jump out in there into the fingers, which was very peculiar. But there was no great pain or anything to it, except in the thumb. It was just that it kept me in suspense all the time, and I noticed it bothering me always.

Q. Did you have anything in the way of an electric sensation?

A. Yes, that was sort of electric there, and that was in the arm and run down in my ear lobes. Very painful, but it [51] wouldn't last, oh, we will say half a minute.

Q. How many times a day would it occur?

A. Oh, sometimes two or three times a day, something like that, in 24 hours. I never kept no track of it. It would just hit me every now and then during the spell of sickness I had.

(Testimony of Harry J. McQueen.)

Q. Now, after the operation by Dr. Norcross, what, if anything, did you note was improved in your condition?

A. Well, when I got up and out of the bed I walked, which was a great surprise to me, and my balance was all right. I was 90% improved, anyway. Still, I have a little trouble. I don't know what to attribute that to, but it might be on account of this operation I had, because I have a lot of pain yet in the shoulders, and tiredness and weakness all the time. I am not strong.

Q. Did you notice any change after the operation with respect to the headaches and the feeling in the back of your head and neck?

A. They completely left. None whatever. I didn't have any since I got out.

Q. Is that the headaches that you speak of?

A. Yes. No headaches at all. They all left and the balance returned.

Q. Now, since the operation do you have any trouble at all with your neck or with your shoulders? [52]

A. Yes. That's what I speak of. It is—well, I seen the doctor—is it permissible to talk about the doctor?

Q. I think we better let the doctor cover that. You just tell us what you yourself——

A. Anyway, I am just tired all the time. If I shave or if I do something, it fatigues me out. I can't do anything at all without I am just completely played out. As far as being a man is con-

(Testimony of Harry J. McQueen.)

cerned, or anything in the working condition, I am just not there.

Q. Is the feeling in your neck any different now than it was before the operation?

A. Yes, it's a different feeling altogether. Mostly in a different place.

Q. Do you have any difficulty looking up or tilting your head up? A. Yes, I do.

Q. What difficulty do you have?

A. Well, when I look up, it seems where the operation was, where the disc was taken out or attended to, whichever the case was, I have a pain when I look back or look up too much or turn around too much one way or the other. [53]

Q. Are you able to turn your head or your neck as you were able to before the accident?

A. No. No.

Q. What about—I am not sure that I asked you about before the operation—did you have anything with respect to ringing in your ears or head?

A. Before?

Q. Yes. A. No.

Q. Before the operation, that is, after the accident, but before the disc operation, did you have any ringing in your ears?

A. Yes, always. I thought you was speaking about the accident.

Q. Did the operation do anything to help that sensation?

A. Well, the ringing is still in my ears, but the sensation like it was in my hands is all gone.

(Testimony of Harry J. McQueen.)

That is, the center of my head from both ears in, there was a sensation going into my head, and that sensation has stopped with the hand, but the ringing still continues in my ears always.

Q. Since the operation do you have any difficulty in walking or getting about?

A. Since the operation?

Q. Yes. Aside from the matter of balance, which you say returned, do you have any other difficulty in walking or [54] getting about?

A. Well, I can't step as quick and I am not so sure of myself on account of this distress feeling I got in my neck. That's the only reason. But I can step just as good as anyone, you know, but not sure of the step.

Q. Before the accident, what was your condition of health and physical condition?

A. Well, it was O.K., I guess.

Q. Had you ever sustained any serious accidents before the one that this lawsuit is about?

A. No.

Q. Had there been a time years ago when you had broken a toe? A. Yes.

Q. Did you recover completely from that?

A. Yes.

Q. Had you lost some time on another occasion because of the flu? A. Yes.

Q. And was there another occasion when you were hit on the head with a rock while on duty?

A. Yes.

Q. State whether you recovered from that.

(Testimony of Harry J. McQueen.)

A. Oh, yes. I continued work on it.

Q. In the year 1955 did you get some treatment for a [55] sinus condition? A. Yes.

Q. State whether or not you were cured?

A. Yes, I was.

Q. Now, was there any compulsory retirement age on the Southern Pacific for conductors or brakemen? A. No.

Q. Before this accident took place what had been your plans with respect to continuing working?

A. Well, I expected to keep busy as long as I could and was in good health.

Mr. Hepperle: You may cross-examine.

Cross Examination

Q. (By Mr. Martin): Mr. McQueen, you had this operation performed by Dr. Norcross of Oakland, is that right, sir? A. Yes.

Q. And that was done at the Peralta Hospital in Oakland? A. Yes.

Q. And according to the records here, you were in that hospital from about March the 31st until about April the 5th; is that about right?

A. That's right.

Q. And you were operated on on April 1st, is that about right? [56]

A. I believe that's right, April.

Q. So you have only been discharged from the hospital for a little over a month prior to today; is that correct? A. How would you say that?

Q. I say you have only been out of the hospital

(Testimony of Harry J. McQueen.)

for a little over a month, prior to the present time; is that correct?

A. Well, whenever the dates were.

Q. Yes. A. When I left there, yes.

Q. And are you still under Dr. Norcross' care?

A. Well, in a way, yes. I am to report back to him on this operation and I——

Q. How often have you seen him since you got out of the hospital?

A. Three times, I believe.

Q. I see. And the last time you saw him was when? A. About a week ago.

Q. Does he do anything more than look you over and ask you how you feel?

A. Yes, he examines me and looks at my neck.

Q. But he doesn't give you any treatment; is that right, sir?

A. He just prescribes pain pills for me.

Q. I see. Now, Mr. McQueen, getting back to the happening of this accident, that occurred in the West Oakland [57] yard, is that right?

A. Yes.

Q. And as I understand it, you were seated at a desk which is the conductor's, you might call it, working space, is that correct, sir?

A. Conductor's desk.

Q. Yes. That's where he does his paper work, is that right? A. That's right.

Q. And the only two people in the caboose were you and the conductor, Mr. Ward, is that right?

A. There was no one, only the two of us.

(Testimony of Harry J. McQueen.)

Q. Yes. And you had been on this run from Roseville to Oakland and it was toward the end of the run, is that right? A. Yes, Oakland.

Q. And was this a regular run for you? Did you have a regular job on that run?

A. Yes, regular.

Q. And this caboose that you were in was a wooden caboose, I believe the testimony has been?

A. Inside and out.

Q. As distinguished from the metal ones that we see from time to time, now, is that right?

A. I didn't understand.

Q. I say they have wooden ones and metal ones, don't they? [58]

A. Oh, yes, wooden and metal, all steel frames, whatever you term them. Three or four kinds.

Q. And I believe you said there were grab irons located to your left and right as you were seated in this caboose, is that correct, sir?

A. That's right.

Q. What are grab irons?

A. Place to hold on.

Q. And were they close enough to you so you could reach and hold onto them with either your left or right hand if you had wished to?

A. Well, you have to be pretty much stretched out. The idea of them is that you have one on each corner, so if you are going in this direction, the caboose is never turned around completely, so as to serve you either way, that you may grab and hold or grab and push to save yourself.

(Testimony of Harry J. McQueen.)

Q. I see. And as I understand the testimony in this case you weren't holding onto either grab iron, is that correct, sir? A. No, I was not.

Q. And isn't it true, Mr. McQueen, that the rules under which you operate require you to anticipate a sudden stop at any time when coming into yard limits?

A. Anticipate a sudden stop?

Q. Yes. [59]

A. I don't believe they read like that.

Q. I beg your pardon?

A. I don't believe they read just like that.

Q. Well, I was paraphrasing it. I think the rule, 2061 of the safety rules, provides: "On trains entering or leaving yards or when approaching places where a stop is to be made or speed reduced, take necessary precaution, particularly on cabooses, to avoid injury which might result from sudden, unexpected movement."

Is that the rule? A. That's the rule.

Q. And that's the purpose of the grab iron, is that correct, sir?

A. The purpose of the grab iron is to protect yourself.

Q. Yes. In this particular caboose that rule is posted right in the caboose, is it not, sir?

A. Well, there's some rules posted in there. I don't know whether it is that rule.

Q. Well, isn't that particular rule posted right above the conductor's desk there?

A. "Safety is a rule of first importance," and

(Testimony of Harry J. McQueen.)

such a rule is that, posted up in some of them. And some of them has got another rule.

Q. And some of them have this rule that I have just read posted, don't they? [60]

A. No, not that rule, I don't know.

Q. Have you ever seen that rule posted in a caboose?

A. Not that I recall. Not that rule.

Q. I see.

A. Your rule could be there, but I don't know the term of the whole rule. It's a safety rule.

Mr. Martin: May I approach the witness, your Honor?

The Court: You are going to have a few more minutes with this witness?

Mr. Martin: I imagine I will, your Honor, yes.

The Court: I have to swear in a new United States Attorney at 4:00 o'clock, so I think rather than get into this any further, we might take the adjournment now.

Mr. Martin: That's fine, your Honor.

The Court: And then you can give him that, because you may want to show this picture to the jury. I don't know what your plan is. Perhaps it would be better to do that in the morning.

Mr. Martin: Very well, your Honor.

The Court: Would you have all the doctor witnesses here on both side tomorrow so we can get this completed?

I have to perform one of the duties that a judge has to do right now, and that is swear in a new

United States Attorney, so we will have to go a little earlier today. [61]

All right, will the jury please return tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Tuesday, the 2nd day of June, 1959 at 10:00 o'clock, a. m.) [61-A]

Tuesday, June 2, 1959, 10:00 O'Clock A. M.

The Clerk: Harry J. McQueen versus Southern Pacific, further trial.

Mr. Hepperle: Ready, your Honor.

Mr. Martin: Ready, your Honor.

Mr. Hepperle: May we have the Court's permission, your Honor, to call a doctor at this time?

The Court: Very well. No objection?

Mr. Martin: No objection.

DR. NATHAN CROSBY NORCROSS

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Nathan Crosby Norcross.

Direct Examination

Q. (By Mr. Hepperle): Where do you maintain your offices, Doctor?

A. 400 29th Street, in Oakland.

(Testimony of Dr. Nathan Crosby Norcross.)

Q. Are duly licensed to practice as a physician and surgeon in the State of California?

A. I am.

Q. Do you specialize? A. I do. [63]

Q. And will you tell us, what is your specialty?

A. Neurological surgery.

Q. And what does the field of neurological surgery include?

A. It has to do with surgical treatment of various disorders and diseases of the nervous system, the brain, the spinal cord and the nerves of the body.

Q. Will you tell us something of your background and qualifications as a neurological surgery specialist?

A. I graduated from medical school in 1932. Following that, I took a year's rotating internship. After that for a year I studied in Europe. About half of that time I was in National Cancer Institute in Madrid, Spain, where I studied the microscopic appearance of nerve cells and various conditions.

Following that, for the other half of that year, I was in the National Hospital for Diseases of the Nervous System in London, England, studying the medical aspects of neurology.

The next two years I spent at McGill University in Montreal, Neurological Institute, as a research fellow in Neurophysiology.

Then, for three years I was with the University of Pennsylvania in Philadelphia. During two of

(Testimony of Dr. Nathan Crosby Norcross.)

those years I was the resident in neurological surgery at the University Hospital and for one year I was a fellow in research surgery [64] at the University of Pennsylvania Medical School.

I then completed my training and started private practice in San Francisco in 1939.

Q. Have you had military experience, Doctor, in connection with your specialty?

A. Yes, I was in the Navy for five years during the war. The first three of those years, approximately, I was neurosurgeon at the Mare Island Naval Hospital. For one year I was chief of neurosurgery at the Naval Hospital at Aiea in Hawaii, and for one year I was chief of the neurosurgical center at the Naval Hospital Center at Great Lakes.

Q. Are you, Doctor, a member of any of the neurological surgery societies?

A. Yes, I am a member of the Western Neurological Society, the Irving Cushman Society and the Academy of Neurology.

Q. Are you, Doctor, certified as a specialist by the American Board of Neurosurgeons?

A. I am. I was certified in 1941.

Q. Did you, Doctor, at our request, examine the plaintiff in this case, Mr. Harry McQueen?

A. I did.

Q. When did you first see him?

A. I first saw him December the 30th, 1957.

Q. At that time, Doctor, did you take a history of the patient? [65] A. I did.

Q. Without going into the details of the accident,

(Testimony of Dr. Nathan Crosby Norcross.)

Doctor, will you tell us what this patient's complaints were following the accident?

A. Following the accident his complaints were of immediate feeling sort of rum-dum or addled. He had pain in his right arm, headache, his right arm was swollen, and he had discomfort in his neck.

He was hospitalized, heat was given to his arm, which improved over a period of time except for the right thumb. That he immediately noted trouble in walking. That had continued.

By the time I saw him in December he was complaining of headache, chiefly in the back of the head and behind the eyes on both sides. He had a good deal of pulling of the back of the neck. He was unable to walk straight. He veered when he was walking, and in traffic or crowds he had to stop for fear of losing his balance.

Q. Did you then, Doctor, inquire into his past history? A. I did.

Q. Was there anything of significance in the past history?

A. Well, he had an osteomyelitis of his leg as a child that left a deforming scar on the leg. He had a number of minor injuries, one of them disabling him for perhaps two weeks, and that was about it. [66]

Q. Did you then, Doctor, make a neurological examination? A. I did.

Q. Would you tell us what the significant findings were upon the examination?

A. Well, the neurological examination did not

(Testimony of Dr. Nathan Crosby Norcross.)
have many clear-cut, significant findings. The most outstanding of these was the fact that he stood with a broad base, with his feet separated, because he was unable to keep his balance well. And as he walked, his gait was what we call ataxic. He veered, he staggered as he walked.

He showed fasciculation—those are little, small contractual trembling of the muscles of his legs and in the muscles of his right thumb.

Those were the outstanding findings at that time. The remainder of the neurological examination was not remarkable. He had an old scar on the right part of his head, the result of an injury he had as a child.

Q. What, if anything, did you note with respect to his neck, Doctor?

A. His neck was sore, spastic, tender, and showed limitation of movement.

Q. What, if anything, was revealed by X-rays of his neck?

A. X-rays of his neck revealed a good deal of osteo-arthritis. This is a type of arthritis that all of us acquire in varying degrees as we grow old. When I first saw him, he [67] was 63 years old. Perhaps it was not out of line for his age, although it was a little more marked than we frequently see.

Q. What, if anything, was shown by the X-rays of his neck, Doctor, with respect to the curve of the neck?

A. The X-rays of the neck show a reversal of the curve. The neck normally is curved fairly

(Testimony of Dr. Nathan Crosby Norcross.)

evenly, and in bending the neck we ordinarily find this curve to straighten out or become more accentuated.

In this particular case, there was a reversal of this curve at the level of the 5th and 6th cervical vertebrae, and this is a common finding and frequently does indicate muscle spasm in the neck.

Q. What is muscle spasm, Doctor?

A. A tight, sore, tense muscle that remains contracted instead of relaxed a great deal of the time, and because of this, amongst other things, it is usually painful.

Q. Following this examination, Doctor, did you form an impression at that time as to Mr. McQueen's condition?

A. Not a very definite one. It seemed apparent to me at that time that he had some disorder of his central nervous system, most of it apparently in the spinal cord. He had a very definite, decided cervical neuralgia. This is what I term this painful muscle spastic affair in his neck. The findings were consistent with that.

The evaluation of the fasciculations in the muscles [68] in his neck were difficult. They brought up the possibility of some degenerative disorder that had not been recognized, and at that time I was not sure what relationship they had to the injury that he had sustained.

Q. Did you later, Doctor, have an opportunity to review the Southern Pacific Hospital record of Mr. McQueen? A. Yes, I did.

(Testimony of Dr. Nathan Crosby Norcross.)

Q. With respect to the diagnosis shown on the record, Doctor, "CNS lues," will you tell us what that is?

A. That means syphilis of the central nervous system.

Q. State whether or not that diagnosis is substantiated by the findings in the records.

A. No, I don't think it was. This diagnosis was, I don't think, ever actually made. It was suggested because on one occasion he had a positive Wasserman reaction. Subsequently, many others were taken and none of them showed positive.

This is something that we have to face in medicine. [69]

There is no test we have that is completely sure and specific, and that includes a Wasserman reaction. I think we have to feel in this case that this was one of those unusual but not too uncommon false positives that we always have to check.

In this case nothing else was ever found. That is not adequate to substantiate a diagnosis of syphilis of the central nervous system.

Q. State whether there was any evidence of such a condition, Doctor, as shown by the neurological examination. A. No, there was not.

Q. Now, following the review of the Southern Pacific Hospital record, state whether you suggested that a myelogram examination be made.

A. Yes, I did. I felt that we could not make a definite diagnosis in this particular individual, and I further felt that further diagnostic studies

(Testimony of Dr. Nathan Crosby Norcross.)

were called for. I was not happy with the information we had. I think we should acquire more information in other ways.

Q. Did you, Doctor, before the myelogram procedure, re-examine Mr. McQueen on March 9th of 1959? A. Yes, I did.

Q. And what were his complaints at that time?

A. At that time his complaints were essentially the same. If anything, his legs were more ataxic. He didn't use them as well as he had before. [70]

He complained of occasional pain in the right arm still, and that was essentially it. In addition to his previous complaints, they had not changed significantly.

Q. Did you then, Doctor, have him admitted to Peralta Hospital? A. I did.

Q. Did you carry out the myelogram procedure?

A. I did on March 10, 1959.

Q. Will you tell us how that is done, Doctor?

A. Well, a myelogram is a special diagnostic X-ray test. Ordinary X-rays show bony detail. They show some soft tissue but not very much. Many things can occur to a body that the X-ray does not show. There are ways of enlarging the X-ray's values, and this is by use of various dyes that we may inject into various portions of the body.

In this case we injected a suitable dye into the lower spinal canal. The dye is heavier than the spinal fluid and, by tilting the patient up, we can run that dye up into the neck or even into the

(Testimony of Dr. Nathan Crosby Norcross.)

head, and we watch it as it runs because it is quite easy to see, and if it shows deformities or abnormal patterns, we can snap X-ray pictures and make a record of it.

Q. Now, in this instance, Doctor, what was revealed by the myelogram?

A. In this case there was a very definite indentation of this column of dye, chiefly at the level between the fifth and [71] sixth cervical vertebrae. This is in the lower part of the neck.

Q. Were X-rays taken to demonstrate that, Doctor? A. They were.

Q. And are they contained here in this envelope from the Peralta Hospital? A. They are.

Q. If you were to demonstrate them with the light box, could we, as laymen, see and appreciate what the finding was in this myelogram?

A. Yes, I think we have the change fairly clear in the myelogram.

Mr. Hepperle: May we have the doctor demonstrate, your Honor?

(Thereupon the witness left the witness stand and went to the shadow box on counsel table.)

The Clerk: Please speak loudly so the reporter and the jurors can hear you.

The Witness: We take a good many films in carrying out a test of this sort, and from those only some of them show us the changes that we are looking for.

This is an example of one. The patient is on

(Testimony of Dr. Nathan Crosby Norcross.)

his face. This column of dye is seen here within the spinal canal of the neck.

Now, he shows some little dents anteriorly here which [72] are consistent with the osteoarthritis that he has and which we often see. A little further down here, between 5 and 6, you will see a considerably larger indentation, a dent here that I will show you in some other films, more than we expect to see, and we can see that this is definitely abnormal.

Then, looking from another angle, we took more films. These are looking directly from behind the patient forward. I think you can see here at the base of the skull that in this area of the spinal cord this shadow is much less dense, showing that there is less of this dye there, and indicating a mass in that area that prevents the dye from flowing properly. The same thing is shown here.

It is also noted at this time that there is a slight indentation on both sides at this same level, consistent with the findings that we see where a disk is herniated, and these findings are more marked on the right side than they are on the left side.

The other film I don't think adds much. Again we see the same thinning at this level particularly and the indentation on both sides. There are other films that do not show these changes as clearly.

Mr. Hepperle: Thank you, Doctor. Would you resume the stand?

(The witness resumed the witness stand.)

(Testimony of Dr. Nathan Crosby Norcross.)

The Court: Have those films been marked already [73] for identification?

Mr. Hepperle: Yes, your Honor. The envelope is marked plaintiff's Exhibit 1. Should these three be given sub-numbers?

The Court: I think so, so as to indicate what films the doctor referred to.

(X-ray films just shown were marked Plaintiff's Exhibits 1-A, 1-B and 1-C for identification.)

The Clerk: Are they offered in evidence, counsel?

Mr. Hepperle: Yes, your Honor, they are offered into evidence.

The Clerk: Introduced and filed in evidence.

(Plaintiff's Exhibits 1-A, 1-B and 1-C for identification were received in evidence.)

Q. (By Mr. Hepperle): Now, following this myelogram procedure, Doctor, did you then have Mr. McQueen readmitted to Peralta Hospital?

A. I did.

Q. And what was the date of that next admission?

A. That would have been March the 31st.

Q. And while he was in the hospital on that occasion, what, if anything, did you do for him?

A. I operated upon him.

Q. And will you tell us what kind of an operation it was and what you did? [74]

A. This operation is called a laminectomy. The laminae in the spine are little arches of bone that

(Testimony of Dr. Nathan Crosby Norcross.)

cover the back of the spinal canal and, to get into the spinal canal, we have to remove some of these little arches. This is called a laminectomy or removal of the arches.

This lets us in the spinal canal and then we can deal with the contents of the spinal canal as we need to. The name itself does not signify completely what was done, but it's the general type of operation that was carried out.

We carried this out in this patient. We removed the spinal arches, the laminae of the 5th and 6th cervical vertebrae, the one lying just above and just below the area where we saw a shadow in the X-ray.

We entered the spinal canal. We opened the dura. This is a tough membrane that surrounds the spinal cord. And then by tilting the cord slightly to one side we were able to show a very decided mass that was coming backward against the cord from the area of the vertebral body in front. It was compressing the roots slightly and the cord even more so.

This same state of affairs was found on the opposite side. We then sectioned the dentate ligaments. These are small ligaments that hold the spinal cord in a fairly neutral position within the spinal canal. And in this case, because they do hold the cord, they were holding it forward against this mass that was pressing back against it, and in this way [75] bringing about a definite compression of the spinal cord.

After we had sectioned these ligaments, then the

(Testimony of Dr. Nathan Crosby Norcross.)

cord is able to move more freely within the canal, which is sufficiently large for it, and it was able to ride back away from this mass that was pressing upon it.

In this way, in a large part at least, we were able to remove the compression on the spinal cord. The wound was then closed up with sutures in the usual way.

Q. Following the operation, Doctor, were you able to make a definite diagnosis as to the cause of Mr. McQueen's difficulty?

A. Yes. Mr. McQueen had suffered a compressive disorder of the spinal cord caused by the disk disease that we had demonstrated that he had.

Q. Now, after the operation, Doctor, was there any change with respect to Mr. McQueen's condition, particularly respecting his legs?

A. Yes. Following the operation, almost as soon as he got out of bed and onto his feet, he stated immediately that his legs behaved as they should, or very nearly so, and he had lost his instability.

The lack of equilibrium was greatly improved, the lack was decreased and he was able to walk with a great deal of certainty, and he felt that he was far better than he had been before the operation.

Q. Do you have an opinion, Doctor as to whether Mr. McQueen's injuries and difficulties were caused by this accident of May 29, 1957?

A. I believe his disability was brought about by the accident of May 29, 1957, which by trauma to his neck and shoulders had brought about an aggra-

(Testimony of Dr. Nathan Crosby Norcross.)

vation of a condition that we are quite sure had been present before, but which had been symptomless and was giving him no difficulty. This injury, then, aggravated, upset and disturbed this state of affairs until it brought about the disability and changes that we found, which were, in part at least, helped considerably by the surgical procedure, that in part corrected the state of affairs which was found within his spinal canal.

Q. Doctor, would this diagram be of assistance in helping to explain the mechanism of the injury here and the cause of the complaints and the fasciculations in the legs and at the base of the thumb?

A. Yes, I believe it would.

Mr. Hepperle: May we put it on the blackboard, your Honor?

(Diagram placed on blackboard.) [77]

The Witness: This diagram shows a cross section of the area that we are talking about. The back of the neck is back here. The skin would be about in this area. These are those little arches of bone, the laminae, that I spoke of.

In our operation we came down this way and removed these laminae, took them out. Then we were able to come down on the dura, which is this little place indicated here in white.

We opened it and then were able to observe the spinal cord that lies here.

Now, I think you will see that this is indicated as a herniated disc, essentially the same type of thing that we found in this case. These are the vertebral

(Testimony of Dr. Nathan Crosby Norcross.)

bodies here. These discs lie between them. They should come along at about this level. They do bulge and herniate out, and they do, as you can see, press against the spinal cord, which is being held down by these two ligaments, one indicated there and one indicated here. It holds the cord forward against this mass and causes compression of the spinal cord.

By sectioning these ligaments, the cord is then able to ride back off this mass, and most canals are larger than this in relation to the size of the spinal cord, so if we can keep the cord from being held down against this mass, there is plenty of room in the spinal canal for the cord to float around more freely than it could before, and in this case we [78] were able to cut these ligaments and the cord floated back away from this mass and was then no longer compressed.

I might add that we usually leave these masses intact. Once in a while we are forced to tackle one, but it is tremendously dangerous to try to remove them because they are partially calcified, so as a rule we don't attempt it.

Q. Would you explain further, Doctor, the connection between the pressure on the spinal cord and the complaints and difficulty that Mr. McQueen had?

A. Well, the spinal cord consists primarily of many nerve fibers coursing on down to various portions of the body. Those fibers function fairly well except when they are squeezed or damaged in some fashion.

(Testimony of Dr. Nathan Crosby Norcross.)

In this case, or a case of this kind, where you are squeezing the spinal cord, you are getting pressure on many of the fibers within the cord and obstructing the function that is controlled by those fibers, in this case primarily the use of his legs. Secondarily, the introduction of these little fasciculations in the muscles, which is a sign of a disorder of cells in the case of a hand, or may be a sign of disorders of the nerve fibers as in the case of his legs.

Q. When did you next see the patient, Doctor?

A. I saw him next on April 30th.

Q. And what were his complaints at that time?

A. Well, he said that he walked well, that he felt able, [79] that he did not fear when he was walking. He had a good deal of pain in his neck and shoulders still. He had some difficulty with the control of his urine. He did not have any pain in his thumb. These fasciculations, the little muscle twitchings that had been seen before, were much less. He stood properly, without swaying and his gait appeared to be quite satisfactory if he walked slowly.

Q. State whether or not, Doctor, the improvement noted by the patient substantiated your diagnosis of herniated intervertebral disc?

A. It substantiated my diagnosis of compression of the spinal cord and disordered function of the spinal cord due to the herniated vertebral disc.

Q. Did you, Doctor, at that time, have Mr. McQueen checked for anemia?

A. Yes, I did. He had had some complications following his surgery. He had become moderately

(Testimony of Dr. Nathan Crosby Norcross.)

anemic, but he was going downhill after the operation and I felt that we should investigate that to see if something were going on that required specific therapy.

Q. State whether or not you placed him under the care of a specialist, Dr. Chew, for that condition? A. I did.

Q. Do you have an opinion, Doctor, as to what the cause of the anemia is here? [80]

A. I think, from all of our studies and what has been done, we have to feel that Mr. McQueen is one of those people that just can develop some degree of anemia fairly readily under the case of stress or something of that sort, and many times when a person starts anemia mildly they may continue to go downhill unless treatment is instituted. There was no evidence that this anemia of his was one of the serious and vicious varieties in terms of anemia that many people suffer from from time to time.

Q. Now, Doctor, do you have an opinion as to whether Mr. McQueen is disabled for his job as a railroad man?

A. Yes, I think he is disabled for his job as a railroad man. At the present time his greatest disability is pain and discomfort in his neck. The neck can be extremely painful and disabling.

The condition of his lower extremities has improved to the point where I think he can walk around ordinarily without much difficulty.

He finds, though, and this is consistent with our findings and his course, that if he tried to start

(Testimony of Dr. Nathan Crosby Norcross.)

jumping around or hopping or had to do anything that he might have to do in an active life on the railroad he would have difficulty with his leg still.

I would question that at his age this is probably ever going to improve to the point where he will be able to get on [81] and off trains and do the things that he would have to do as a conductor on the railroad. He would be much better and be able to get around well with his leg.

The problem of a painful neck is a difficult one to decide at this time. It is extremely painful now. The movement of his head and neck aggravates this pain. The pain is due in part from the injury he sustained. He has had it ever since, in part from surgery. He had a postoperative infection following this surgery, unfortunately, and that has left a good deal of scarring in his neck. So I feel that he is going to have a good deal of discomfort in that neck for a long period of time, and that in itself is a disabling pain factor. The trouble will slowly improve but may well be over quite a long period of time. He has been out of the hospital for some time now and he hasn't gotten much better yet.

Q. State whether or not, Doctor, in your opinion, Mr. McQueen's disability was caused by this accident of May 29, 1957.

A. I think his disability resulted from that accident.

Q. And will you state, Doctor, whether there is objective evidence, having in mind the findings in

(Testimony of Dr. Nathan Crosby Norcross.)

your record, that Mr. McQueen's subjective complaints are justified and understandable?

A. Yes, I think they are. The muscles in the neck are tense, they are spastic. There is limitation of movement there. He still has a little fasciculation in the leg. Much [82] less than they were, and they are improving. The use of his legs is much better, but when he tries to do something rapidly with his legs he doesn't do it very well. He is a little clumsy, put it that way.

Q. With respect to the surgery, Doctor, was it possible to repair the condition with respect to the spinal cord?

A. Well, we removed the compression of the cord, thereby hoping to arrest any further damage. Now, nerve fibers or cells that have been damaged by pressure or anything else can stand a certain amount of it and then they die. There are many, literally millions of fibers in the spinal cord. I think without any question some of the fibers have been killed.

Fibers within the brain or within the spinal cord never grow out again because they are dead, and we are left here with a definite deficiency in certain types of fibers in his spinal cord, I think probably those having to do with the agile use of his legs, the matter of rapidity or difficult use, and I feel he is going to continue to improve even from what he is now, but some of these fibers have been killed and will not regenerate, they cannot, and I question very much if he will ever be able to be as agile on his legs

(Testimony of Dr. Nathan Crosby Norcross.)

as he was, or indeed to be sufficiently so to carry out his occupation.

Q. You mentioned, Doctor, the matter of the operation and their being a question of their following pain in the neck. Will you please tell us more about that, Doctor? [83]

A. Following surgery, he developed a superficial infection of his wound. It did not go in deeply, but it was rather resistant to treatment and healed slowly. We had to open it once and then reclose it. This created a lot of scarring in the tissue underneath the skin on the back of the neck, and scarring on the back of the neck is likely to bring about rather a miserable, long-lasting, chronic, painful neck that is not pleasant at all.

Q. Is Mr. McQueen still taking pain medicine, Doctor?

A. Yes, he is. I still prescribe pain medicine for him.

Q. And is that justified, Doctor, in your opinion? A. I believe so.

Q. When you last saw him, Doctor, what was the date that you last saw him?

A. 29th of May, 1959.

Q. And what were his complaints or his condition at that time?

A. Primarily his neck and shoulders, pain, stiffness, inability to look up or turn his head.

The use of his legs, again, had continued to improve in walking only, but if he attempted to step

(Testimony of Dr. Nathan Crosby Norcross.)

up a step or turn quickly he still had some difficulty, and this will improve only very slowly.

Q. State whether or not those complaints are justified in your opinion, Doctor? [84]

A. I believe they are.

Mr. Hepperle: You may cross examine.

Cross Examination

Q. (By Mr. Martin): Doctor, you read what was stated to be the diagnosis of the General Hospital of Mr. McQueen's condition, but you weren't read the full diagnosis. Let me read it all to you, starting at the beginning:

"The first diagnosis that I see is, probable posterior column disease, spinal cord. Etiology unknown."

Now, what is the posterior column disease?

A. Posterior column disease is one that affects the fibers of the posterior column and gives people disorders of equilibrium and balance, primarily.

Q. Such as he showed? A. Yes.

Q. And it says, "Etiology unknown." What does that mean, Doctor?

A. They didn't know the cause of it.

Q. And then later on, I mean the second diagnosis, what was read to you was "CNS lues," and then in brackets the words "not reported," close brackets. Would that indicate that it wasn't considered of sufficient importance to make a report of it to somebody? [85]

A. Well, it was probably considered it wasn't

(Testimony of Dr. Nathan Crosby Norcross.)

sufficiently sure it was right to report it, because you must be very sure before it is safe to report it to the State.

Q. Yes. In other words, it was just a tentative thing that nobody had made a positive diagnosis of?

A. I believe so.

Q. Yes. And the first primary diagnosis of "Probable posterior column disease," is that the general type of thing that this compression would produce? A. Yes, that is right.

Q. And is the compression that you have discussed a type of posterior column disease?

A. No. The compression will involve the entire cord. It may involve the posterior column in some degree. In this particular instance, actually on the neurological examination there was rather more evidence of the involvement of the anterior portion of the cord than of the posterior column.

Q. I see. But at any rate is it fair to state the symptoms he showed could be, if one were making a diagnosis related to the posterior column disease, were they not?

A. Well, it could be related to spinal cord degeneration. I think that is also a term used in that record elsewhere.

Q. Oh, well, I am just looking at the face of it, [86] Doctor.

I note, Doctor, that on your first examination, which was made on December 30, 1957, you felt that Mr. McQueen first of all had a decided cervical neuralgia. What does cervical neuralgia mean?

(Testimony of Dr. Nathan Crosby Norcross.)

A. Pain in the neck.

Q. And that you based upon the complaints of pain and the spasm and the rigidity which you observed in X-rays and on clinical examination, is that correct? A. That is correct.

Q. That would go with a strain of the neck, would it not, Doctor? A. Yes.

Q. And you state that that type of head and neck pain following trauma such as he described was one fraught with uncertainty as to the speed of convalescence and the improvement. "Most of these patients get well eventually and are relieved of essentially all trouble. Once in a while one continues for an indefinite period of time without significant relief."

In that respect you were speaking primarily of what the layman might call a whiplash injury; is that right, Doctor? A. That is right.

Q. Then you went on to say, "A troublesome problem in this particular instance is the presence of fasciculations in both calves." [87]

That is the little twitching you have told us about? A. Yes.

Q. "These indicate that there may be some degenerative disorder of the nervous system not heretofore recognized."

Now, the "degenerative disorder of the nervous system," that could be the spinal cord or the brain, is that right?

A. That is right. It is a very broad term.

Q. And that was the same type of a broad diag-

(Testimony of Dr. Nathan Crosby Norcross.)

nosis as we found in the hospital record that I just read, is that correct? A. That is correct.

Q. In other words, at the time you first saw Mr. McQueen you did not feel that the picture was a clear-cut one of pressure of the cord caused by a disc? A. No, I did not.

Q. And it was only over a year later when you saw him in the early part of this year and carried out your myelography procedure that you were able to come up with a diagnosis preoperatively which tended to pinpoint it as pressure on a disc, is that correct? A. Yes, that is correct.

Q. Now, in your first examination of Mr. McQueen did you receive a history of previous headaches and neck difficulty?

A. No. He had a minor head injury in 1949, apparently, that didn't bother him too much. That is the only note I have. [88]

Oh, he said he had some sinus trouble from time to time.

Q. I see. It is true, is it not, Doctor, that arthritis, degenerative arthritis of the neck, can be a cause of headache and that type of thing, can it not?

A. At times it can, yes.

Q. And the typical type of headaches is what is described frequently as an occipital headache, is that right? A. That is right.

Q. That radiates up from the base of the neck up into the back of the head.

A. That is right.

Q. And were you aware that in 1950 he was

(Testimony of Dr. Nathan Crosby Norcross.)

given a course of neck traction for headache and neck pain?

A. 1950? Was that when he was hit on the head with a rock while on duty and was hospitalized and had some post-concussional headaches at that time?

Q. That was alleged to have occurred in June of '49, Doctor. I am now speaking about the early part of 1950. A. Not that I know of.

Q. Would cervical traction—that is, that is immobilizing the neck, is it not?

A. Stretching the neck.

Q. Stretching the neck? Would that be consistent with the treatment for an arthritis of the neck?

A. Yes. [89]

Q. And one other thing, Doctor: It is true, is it not, that this operation which you have described and the findings which you made are consistent and is done on occasion on persons with degenerative arthritis of the neck without a history of injury?

A. That is correct.

Q. And I believe you have told us that in your examination and your findings connected with Mr. McQueen, he had a rather marked arthritis in the neck, is that true? A. Yes, sir.

Q. How can this protrusion which causes this compression which your operation, I understand, was designed to eliminate, how can this protrusion come about without injury?

A. Well, the protrusion of a herniated disc is a result of a long, slow process of degeneration of the disc, I believe. I do not feel that these discs are

(Testimony of Dr. Nathan Crosby Norcross.)

actually damaged originally by trauma. I think it's a degenerative process that many people have. Some don't have any difficulty from it and others do. I believe it will eventually go on at times to a sufficient degeneration so that there is a herniation without anything else happening except the ordinary wear and tear of human life, and other times by a blow the thing can be aggravated and speeded up and made worse.

Q. I see. In other words, I understand, Doctor, that people can have a predisposition to this type of thing, is that right [90]

A. I think that is quite true, yes.

Q. And is it reasonable to conclude here, Doctor, that perhaps Mr. McQueen might have had difficulty with that neck independent of an accident?

A. Yes, he might have.

Q. As I understand it, Doctor, you feel that the complaint of neck pain at the present time is related to the post-operative effects; is that correct?

A. Well, I can't quite distinguish which is pre-op and which is post-op. He had this complaint all the way through, and certainly the operation made it worse temporarily. He then unfortunately had this infection, he has a lot of scar in there, and I think it is equally as bad now as it was before, due to our operative procedure and the infection. How much may be residual to what he had before, I don't know.

Q. Do you note any improvement in that regard?

(Testimony of Dr. Nathan Crosby Norcross.)

A. Not very much. A little bit. He is a little looser than he was.

Q. Well, after all, it's only a little more than 60 days following the operation.

A. Yes, that's right.

Q. And he is still in the stage of convalescence from that operation, is he not, Doctor?

A. That is correct.

Q. I think that you have noted a marked improvement in the [91] matter of balance and gait and that type of thing? A. Yes.

Q. And that is still showing improvement, is that correct? A. That is correct.

Q. I notice, Doctor, that in your examinations—I have copies of the reports which you gave Mr. Hepperle—in the two examinations which I have reports of, one before the operation and one after, you found no muscle weakness on your examinations, is that true?

A. Not that was demonstrable, no.

Q. Yes. And I take it he has no muscle weakness at the present time, is that right?

A. Not that is measureable or demonstrable.

Q. And the complaints referable to the right arm even before your operation were only of occasional difficulty or pain, is that true? A. Yes.

Q. And since the operation, has that complaint been eliminated?

A. It is very much better. I don't think he has any particular complaints about the arm. He still

(Testimony of Dr. Nathan Crosby Norcross.)

has a little muscle fasciculation that I can see, but he doesn't complain much about it.

Q. Yes. Well, it is fair to say, is it not, Doctor, that based upon what has gone before, and up to the present time, [92] and bearing in mind that Mr. McQueen is still in the convalescent stage, that he will continue to show improvement?

A. Yes, I am sure he will.

Q. Incidentally, Doctor, do your notes of your treatment of Mr. McQueen contain anything other than what is reported in these reports which you rendered to the attorney?

A. No. There is a good deal of laboratory work which we did that I haven't reported all verbatim. We have discussed it in relation to the anemia. The spinal fluid studies that I had done were essentially within normal limits except for a very moderate increase in protein, suggesting some irritation within the spinal cord. There are an additional two operative notes of the reopening and closure of the infected wound. I think that is about all.

Q. Doctor, with reference to this condition of anemia—which is now under treatment, as I understand it? A. Yes.

Q. Would that, together with the fact that Mr. McQueen is in a convalescent stage following an operation, would that, in your opinion, account for the feeling of easy fatigability of which he complains?

A. Yes, I think that might contribute to it.

(Testimony of Dr. Nathan Crosby Norcross.)

Q. And do you have any record, Doctor, of whether he has been gaining weight lately or not?

A. I don't have one right here, but after having lost [93] quite a little following the surgery, I understand he has gained a little recently.

Q. Yes. And I believe it is your opinion that the anemia is under control. A. I believe so.

Mr. Martin: May I have one moment, your Honor?

Q. One other matter, Doctor: Can this cervical arthritis, this arthritis in the neck, cause a limitation of motion in the neck? A. Yes, it can.

Q. That is, without injury, is that correct?

A. That is correct.

Q. Incidentally, the area between the 5th and the 6th cervical, as I understand, where you did your operation, and the next vertebrae beneath that, the 6th and 7th, is the area of greatest stress in the neck in motion, is it not, Doctor?

A. We feel that probably the level of the 4th and 5th and 5th and 6th is where the greatest stress may come, because that is where we find the greatest evidence of injury.

Q. And also the greatest of arthritis, is that right, Doctor?

A. Well, the two don't necessarily go hand-in-hand. It is most likely to be found there, though.

Q. Because of normal wear and tear? [94]

A. I think so.

Mr. Martin: Thank you; that is all I have.

Mr. Hepperle: That is all.

The Court: That is all, Doctor.

(Witness excused.)

Mr. Hepperle: Would it be convenient to take the recess at this time, your Honor?

The Court: Counsel didn't complete his cross examination of the plaintiff. Do you want to do that after recess?

Mr. Hepperle: Yes, your Honor.

The Court: We will take a brief morning recess at this time, members of the jury.

(Short recess.)

The Clerk: Let the record show Harry J. McQueen, the plaintiff, has resumed the witness stand.

HARRY J. McQUEEN

the plaintiff herein, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Resumed)

Q. (By Mr. Martin): Mr. McQueen, at the time that we finished yesterday, I was about to show you some photographs, which I have shown to your lawyer, and I will show you these pictures and ask you if they show generally the layout of the interior of a caboose [95] such as the one you were in at the time of the happening of this accident. You understand, I don't purport that these are the exact caboose; I am just showing them to you as an example of the general way in which the caboose was laid out and the seating arrangement and so forth.

(Testimony of Harry J. McQueen.)

Mr. Martin: May I approach the witness, your Honor?

A. In a general way, yes, except that these rules are liable to be over here or there or liable to be in the cupola.

Q. Yes. And does that go for this picture, too, Mr. McQueen?

A. Yes, same thing. Only the rules are liable to be someplace else.

Q. All right. And for the purposes of the record, the desk that we are looking at in these pictures is the conductor's desk, is that right?

A. That's correct.

Q. And the grab irons you referred to are these two stanchions that come out on each side of the desk, is that right? A. That's right.

Q. And there is a window right over the desk which permits you to see out and see what's going on outside if you want to, is that true?

A. That's right. [96]

Mr. Martin: So we will offer these at this time for purposes of illustration only, your Honor.

The Court: All right. A and E?

The Clerk: Defendant's Exhibits A and B introduced and filed into evidence.

(Photograph of caboose marked Defendant's Exhibit A into evidence.)

(Photograph of caboose marked Defendant's Exhibit B into evidence.)

Mr. Martin: I wonder if we might at this time pass these to the jury, your Honor.

(Testimony of Harry J. McQueen.)

(Exhibits A and B handed to the jury.)

The Court: I think you might just go ahead. They are only looking at photographs, so I don't think it makes much difference.

Mr. Martin: Very well.

Q. Mr. McQueen, do I understand that at the time of the occurrence of this accident, you were not holding onto the grab irons, is that correct?

A. Would you say that again?

Q. I say at the time that this accident happened, you weren't holding onto the grab irons, is that right? A. No.

Q. However, those grab irons are there for the purpose of guarding against rough action and slack action in the caboose, is that right? [97]

A. To protect yourself, yes.

Q. Yes, and incidentally, Mr. McQueen, I believe you testified you came to work for the Southern Pacific Co. in 1943 during the war, is that right?

A. Yes.

Q. And did you sign on with the Southern Pacific Co. as a brakeman? A. As brakeman.

Q. And had you had experience in railroading before 1943, Mr. McQueen? A. Yes.

Q. How far back did that experience date?

A. Well, around 1916.

Q. And had that always been here in the West or had it been in various other roads?

A. No, it had been several places.

Q. I see. Could you tell us a few of the railroad companies for whom you worked in the past?

(Testimony of Harry J. McQueen.)

A. Well, B & O, Pennsylvania, and Northwestern. And several times for both those railroads, and also worked for I. E. DuPont—that was railroad. That was all railroad. And steel mills, which is railroad—all private concerns.

Q. And had your experience in railroading all been as a brakeman or conductor?

A. Yes. [98]

Q. Have you any estimate of the total time that you have put in, in railroading, Mr. McQueen?

A. Well, if I had it all allowed to me, it would be maybe around 30 years, 29 years.

Q. I see. And incidentally, on some of those railroads, as I understand it, you didn't use the name McQueen, is that right?

A. That's right.

Q. You used a couple of other names, is that true? A. That's right.

Q. And as I recall it, Mr. McQueen, it is your estimate that there were about 92 cars on this particular train coming into West Oakland?

A. Yes.

Q. And about where was it when you come into West Oakland, where you come into what is known as the yard limits?

A. Would you ask that again, please?

Q. I say, could you tell us generally speaking when you are coming into West Oakland, about where is it that you come into the so-called yard limits?

A. Come into the yard limits at Richmond.

(Testimony of Harry J. McQueen.)

Q. I see. A. 12 miles.

Q. And yard limits simply means an area designated by the roalroad where there are many spur tracks and industries [99] along the right of way, is that right?

A. Yes. Used for making up trains and so forth.

Q. They are switching in and out and making up trains and breaking up trains, and that type of thing, is that true? A. That's right.

Q. And you have to operate at reduced speeds in yard limits, is that correct?

A. Required speed, yes.

Q. And in yard limits particularly, there are a great number of these block signals and automatic signals, like the one that was involved in your accident, is that true, sir? A. Yes.

Q. At the time of the occurrence of this accident, Mr. McQueen, where were you living?

A. Where what?

Q. Where was your residence? Where was your permanent place where you were staying?

A. Well, 1835 7th Street on this end.

Q. In Oakland? A. Yes.

Q. I see. Did you have another residence on the other end?

A. Yes, I had a residence, a house, and then I moved into a hotel and I had several residences up there.

Q. Where would that be, in Roseville? [100]

A. Roseville, yes.

Q. In other words——

(Testimony of Harry J. McQueen.)

A. And out at Citrus Heights, and different places close to the railroad work.

Q. I see. In other words, your work occasionally brought you to Roseville, where you stayed, and then occasionally you would stay in Oakland, the other end of the line, is that right?

A. That's right.

Q. And Mr. McQueen, in your work with Southern Pacific as I understand it, you were qualified not only as a brakeman but as a conductor, is that correct? A. Yes.

Q. A conductor is the man in charge, or the foreman, so to speak, of the train operations, is that true? A. That's right.

Q. And generally speaking, was your work, say for the past year or two before this accident, be mostly as conductor or mostly as brakeman?

A. Well, mostly as conductor.

Q. And how was it determined whether you work as conductor or brakeman? A. How's that?

Q. I say, how would it come about that you would work as conductor sometimes? [101]

A. Well, seniority; pulled off a job. This is a miles job. It is—we have so many miles to run on this division here and then we have so many crews, and when you get the miles made up, why, you pull a certain amount of crews off. Sometimes you—now, at present they have got, I think I heard some of the boys say—this is just hearsay—three crews. But they have had more than five crews.

Q. In other words, if you are working a lot

(Testimony of Harry J. McQueen.)

of men or many crews, you would work as a conductor, is that right? A. That's right.

Q. But when a number of crews are reduced, because of your seniority, you would be required to work as a brakeman? A. Yes, down here.

Q. But most of your work, if I understand you correctly, prior to the time of the happening of this accident, was as a conductor?

A. It's been more as a conductor on this Oakland job than it has been as a brakeman.

Q. Now, how does the work of conductor differ from the work of brakeman?

A. Well, it differs that the conductor has complete charge of the train, supervises the work of it.

Q. As conductor, is most of your work done in and around the caboose? A. Most of it. [102]

Q. And the men report to you, is that right?

A. Yes, they report for work to you.

Q. And you see that they make the proper inspections and make the proper moves when stops are made, and that type of thing, is that correct?

A. Yes. You see to that.

Q. It is true, is it not, that the work of a brakeman is more physically demanding than the work of a conductor? Is that correct?

A. Well, yes, I would say he has got more walking, things like that to do.

Q. The conductor has a lot more paper work, doesn't he?

A. Yes, he has all the paper work, most all.

Q. Yes. And incidentally, as either a brakeman

(Testimony of Harry J. McQueen.)

or conductor, because of the fact the railroad operates almost every day of the year, you are required to be on the road at various hours and under various weather conditions, is that true?

A. I am required to be on the road at various hours, yes.

Q. And regardless of weather, isn't that right?

A. Yes, that's right.

Q. Whether rain or snow or whatever, is that correct?

A. Regardless of the time of day or rain, weather or anything, subject to call 24 hours.

Q. And as a brakeman, do you have to do much climbing about cars? [103]

A. That's according to what job you are on. Some, yes.

Q. Depends on the type of job you get, is that right? A. That's right.

Q. And of course, the more seniority you have, the more control you have over the type of job you get, is that right? A. Yes.

The Court: Mr. Martin, with reference to these two photographs, I understood you to say that they were photographs of different cabooses.

Mr. Martin: No.

The Court: I think you are mistaken. I think they are photographs of the same caboose, but taken from a different angle.

Mr. Martin: That's correct, Judge. What I meant to say is they don't purport to be the caboose in-

(Testimony of Harry J. McQueen.)

volved in this occurrence we are dealing with here.

The Court: Yes.

Mr. Martin: They are just a prototype. May I see those one moment?

The Court: I did a little detective work. That is how I decided that. The calendar seems to be in the same position.

Mr. Martin: I didn't express myself very well, I guess, your Honor. Incidentally, Judge, there is some handwriting on the back of this one, just a line or two, which has [104] no significance in connection with this case. I wonder if it would be all right if I just scratched over it?

The Court: Surely.

Mr. Martin: Thank you, Judge.

Q. Mr. McQueen, did you have some trouble with your neck and headache back in 1950?

A. Neck and head?

Q. Yes, sir.

A. Had flu and headaches.

Q. Were you in the general hospital about that time with complaints with relation to your neck and your head?

A. No. I went in there for the flu.

Q. Did they put you in neck traction at that time?

A. Yes, tried to relieve headaches.

Q. And were those headaches, headaches in the back of your head coming up from your neck?

A. No.

(Testimony of Harry J. McQueen.)

Q. Incidentally, Mr. McQueen, have you recently put on a little weight? A. Recently?

Q. Yes.

A. I'm still underweight from what I went in the hospital.

Q. But you have been gaining a little?

The Court: He wants to you know, in the last few weeks have you gained any weight? [105]

The Witness: Four pounds.

Q. (By Mr. Martin): Is it not true, Mr. McQueen, that as a railroad man at age 65 you are entitled to retire with your maximum pension?

Mr. Hepperle: One moment.

The Court: Well, can you agree on that?

Mr. Martin: I did not think there was any disagreement about it, your Honor.

Mr. Hepperle: I think it is a subject that can perhaps be covered by your Honor's instruction. But the subject of pension we would like to have your Honor instruct the jury is immaterial in this case and is not to be considered in relation to the damages to be awarded to Mr. McQueen in any sense whatsoever.

The Court: Well, this is really a legal matter that you are bringing up, isn't it, Mr. Martin? You are asking his opinion whether or not he is eligible or not for a pension.

Mr. Martin: I think, your Honor — I should think any railroad man would know that, Judge.

The Court: Well, they may, but you know the evils of a little knowledge. If this is some matter

(Testimony of Harry J. McQueen.)

that is not questionable and it is a fact, why, just state it.

Mr. Martin: Well, will you agree that that is the fact, Mr. Hepperle?

Mr. Hepperle: I think it is, your Honor, and I [106] would also like to have your Honor instruct the jury at the time of instructions as I previously indicated.

The Court: All right.

Mr. Martin: All right. Then we have agreed that age 65 is the age at which railroad men may retire on age at maximum pension.

Q And, Mr. McQueen, have you applied for your pension? A. No.

Mr. Martin: Thank you. That is all I have.

The Court: Any redirect?

Redirect Examination

Q. (By Mr. Hepperle): Did you intend to continue working beyond age 65 before this accident, Mr. McQueen?

A. Yes, I made no plans to retire providing I remained in good health.

Mr. Hepperle: That is all.

The Court: That's all. You can step down.

(Witness excused.)

Mr. Hepperle: I have a few brief matters, your Honor. I have the bill of Dr. Chew to add, perhaps it should be added to the other medical bills with a sub-number to show it is an addition.

Mr. Martin: May I see that, counsel?

Mr. Hepperle: Oh, excuse me. [107]

Mr. Martin: Thank you.

The Court: Any objection to that?

Mr. Martin: No objection.

The Court: All right, add it to the other exhibit.

The Clerk: That will be added to the envelope of bills and given the number 3-A.

Mr. Hepperle: We will ask that your Honor take judicial notice of the 1937 Standard Annuity Table, giving the life expectancy of a male aged 63 as 15.62 years, and of a male aged 65 as 14.40 years.

The Court: Very well.

Mr. Hepperle: And the illustration which is now on the board, your Honor, may we offer as plaintiff's next in order?

The Court: That will be Exhibit 4, I believe, isn't it?

The Clerk: Plaintiff's Exhibit 4 introduced and filed into evidence.

(Bill of Dr. Chew received in evidence as Plaintiff's Exhibit 3-A.)

[See page 185.]

(Illustration on blackboard received in evidence as Plaintiff's Exhibit 4.)

Mr. Hepperle: And may it be stated formally for the record that Southern Pacific now admits that a student towerman in the tower negligently flipped the switch which [108] threw the red light or changed the green signal to red immediately in front of the train involved in this case?

Mr. Martin: Yes, sir.

Mr. Hepperle: I have some rules, your Honor. May I show them to counsel?

Counsel would like to confer with your Honor about these rules that we would like to offer. I think that unless I have overlooked something, your Honor, that plaintiff will rest, and perhaps it might be convenient to take the noon recess at this time and perhaps start earlier if that meets with your Honor's convenience.

The Court: Well, except for these rules, you are finished, then?

Mr. Hepperle: That's right, your Honor.

The Court: You don't know just what your plans are, then, I take it?

Mr. Martin: Not specifically, but I will have a witness or witnesses this afternoon, your Honor, but I except it to be quite brief.

The Court: Well, I have a criminal motion that I have to hear, anyhow, and people are waiting for that, so I think we will take the recess now, then.

Come back at 2:00 o'clock, members of the jury. It looks as if we will probably finish this afternoon. Please return at 2:00 o'clock.

(Recess to 2:00 o'clock p.m. this date.) [109]

Afternoon Session: 2:00 P.M.

The Court: Has the plaintiff rested?

Mr. Hepperle: There are a couple of brief matters, your Honor, but I understand counsel has his doctor here and I have no objection to his going ahead with him in order to accommodate the doctor.

The Court: Do you want to do that?

Mr. Martin: Yes, but I would like to make a very brief opening statement first.

The Court: Then why don't you dispose of your matters first, then, if there is going to be an opening statement?

Mr. Hepperle: We have some papers here, your Honor, showing pay increases between the time of the accident and the present time.

Mr. Martin: Your Honor, I have utterly no knowledge of this subject. This is the first time it has been brought to my attention. I don't know where the information came from or whether it is accurate according to some records or what the situation is.

Mr. Hepperle: It came from the Conductors Brotherhood, your Honor. Perhaps it could be admitted subject to counsel having an opportunity to check it.

Mr. Martin: As I understand it, we may be arguing [110] this case this afternoon, your Honor. I don't know what opportunity I would have to check it during the day today.

The Court: Well, that is up to the plaintiff. Counsel doesn't stipulate to it, you will have to prove it, if you consider it is important.

Mr. Hepperle: I do, your Honor, and I can telephone a man and have him here within just a few minutes.

The Court: All right. Is there anything else that you have got?

Mr. Hepperle: Yes, I have four rules to offer, your Honor, and I also have a motion to make

which perhaps should be done in the absence of the jury.

The Court: Well, what sort of a motion is it?

Mr. Hepperle: A motion to strike, your Honor. It is a motion to strike all evidence of defendant's Safety Rule No. 2061 on the ground that it is incompetent, irrelevant and immaterial, that it contravenes 45 U.S.C.A. Section 55, in that it attempts to exempt the defendant, Southern Pacific, from the liability created by the Federal Employers Liability Act, 45 U.S.C.A. Section 51.

Further, that it contravenes 45 U.S.C.A. Section 54, in that it injects into this case the doctrine of Assumption of Risk, which is abolished by the statutes, and is a device designed to enable defendant to escape or lessen its liability for its admitted breach of duty to plaintiff. [111]

And we have five decisions, your Honor, which we cite in support of the motion.

The Court: What evidence is there on that? I don't recall any evidence concerning that. Counsel in cross examining the plaintiff asked him if he were familiar with such a rule.

Mr. Hepperle: That's correct, your Honor, and the rule is also framed on the wall of these two pictures, Defendant's Exhibits A and B.

The Court: Well, you can't read it, can you?

Mr. Martin: I can't read it, I'll tell you that.

Mr. Hepperle: I can, your Honor.

The Court: You can? Let's see them.

Mr. Martin: I intend to offer the rule, your Honor.

The Court: Well, then, if you are going to offer the rule, why don't you wait until he offers the rule and then you can make your objection? I don't know what I would strike.

Mr. Hepperle: We move to strike all reference to the rule, your Honor, that is brought up by counsel in his cross examination of plaintiff, and also that it be stricken from the two photographs, and we have five citations——

The Court: I don't see any merit to that motion at all, Mr. Hepperle. If counsel is going to offer this rule, you can object to it and raise the point properly then. I can't strike it from the photographs. [112]

First of all, you would have to use a magnifying glass or I don't think you can read that. Secondly, it is supposed to be a picture of the room, and it was offered for illustrative purposes, and it was agreed that it was not a picture of the caboose involved in this accident.

I just don't think that the point you are trying to make is reachable under the form of motion you make now, but if counsel offers the rule you may object and I will rule on it.

Mr. Hepperle: Very well, your Honor.

The Court: Now, what else do you have?

Mr. Hepperle: We have four rules to offer from the Southern Pacific Company's rules and regulations of the Transportation Department.

The first one is Rule No. 28, headed, "Service Stock."

Mr. Martin: Before he reads the rules, your

Honor, I would appreciate it if they were shown to you because I have an objection with reference to these rules.

The Court: What is the number of the rule?

Mr. Hepperle: I have them marked on a paper here, your Honor. (Handing document to the Court.) The last one is found earlier in the book.

The Court: Well, I consider that Rule 28 is completely inapplicable. You have already got a [113] stipulation that the red signal was negligently given, causing an emergency stop. I don't see that this would do any more than complicate the matter, Mr. Hepperle. You would have to have someone take the witness stand and explain what these technical terms are that are referred to in the rule. So far as I can see, it would be meaningless and would complicate the case, and it certainly wouldn't do your case any good.

The next one is No. 60?

Mr. Hepperle, without counsel making an objection, I just don't see the applicability of the rule to your case here. It seems to me to relate to matters you are not concerned with here.

Mr. Hepperle: Our point is this, your Honor: that under the rules the engineer is charged with properly handling the train. In this instance the admitted negligence of the tower operator caused this sudden, violent stop. But plaintiff seeks to charge—rather, defendant seeks to charge plaintiff with contributory negligence, and it was my feeling that these rules were pertinent to show that the

sole cause of the accident here was the negligence of the tower man changing the signal.

The Court: Well, you have testimony that the engineer applied the emergency stop and stopped the train immediately.

Mr. Hepperle: Yes, sir. [114]

The Court: I don't see what you think you can do there. Assuming you have objected, I will sustain the objection.

Mr. Hepperle: Well, in relation to the pay information, your Honor, I can telephone the man and he can be here shortly. I don't know whether I should do it now or how long counsel intends to take, or whether it should be done during the recess.

The Court: Well, I don't wish to be harsh about this thing, but a lawyer should be ready with his case. At the very last minute you come in with something you haven't shown the attorney on the other side, and he is not in a position to stipulate to it because he doesn't know whether the figures on there are accurate or correct or not, and then you want to stop proceedings now to bring someone here to testify to these matters. It slows up the process of the case.

What difference does it make, anyhow? It isn't of any great consequence.

Mr. Hepperle: I will withdraw the offer, your Honor.

The Court: Now, the plaintiff has rested?

Mr. Hepperle: Plaintiff rests.

Mr. Martin: Your Honor, counsel, and members of the jury:

I am going to make a very brief opening statement in [115] this case, since the evidence has not taken long and will not take long to conclude, and therefore I don't believe an extended opening statement will really help much in this matter because we will be arguing it before very long.

I believe the evidence will show and has shown that as the train on which Mr. McQueen was riding in a caboose was coming into the Oakland yards a student tower man inadvertently or negligently, however you want to state it, without direction from his senior tower man, threw a switch which caused a red block signal to go on in the path of the locomotive, which immediately, of course, caused the engineer to stop the train, as he is required to do under the rules, in the shortest possible time.

The speed of the train was six to seven miles per hour, which caused what is commonly referred to as a "rough stop" in the caboose.

Mr. McQueen was shaken up in the caboose by consequence of the rough stop which was made.

The evidence will show, I believe, that there are certain rules which apply to people riding as Mr. McQueen was and their conduct in the caboose, which may be considered by you in connection with the question of contributory negligence in this case, which has not been waived by the defendant. What we have done is admit that the throwing of the switch which caused the signal to go red was [116] negligence, but the question of Mr. McQueen's conduct and whether that constituted contributory negligence is before you under the evidence in the case.

Now, his Honor at the conclusion of this case will instruct you fully on the law as to the effect of contributory negligence on the part of plaintiff.

The Court: Mr. Martin, I don't think you really should make that assumption as yet in this case.

Mr. Martin: Well, all right, your Honor. I realize there is a question of law involved, your Honor.

I will say this, that the defense has set up the question of contributory negligence, and if that is acceptable to the Court under the law, you will be instructed on that subject and its effect. I will not dwell upon it here. It's a matter for the Court.

The second aspect of this case has to do with the nature and extent of the injuries which were sustained by Mr. McQueen.

The hospital records have been partially referred to here and may be referred to by a Dr. Van Horn, whom I am calling in a very few minutes.

I think the essence of the matter is that Mr. McQueen had a condition known as cervical arthritis, or arthritis of the neck, which was amply demonstrated by the x-rays which were taken before and after the occurrence of [117] the accident which is the subject of this lawsuit.

Rather than go into a detail explanation of the medical testimony in that regard, we have already heard what Dr. Norcross had to say. We will in a very few minutes put on Dr. Van Horn, also a neurosurgeon, who will explain to you his findings and what the cervical arthritis and the condition of the neck of Mr. McQueen is as he saw it. Upon the conclusion of this case we are going to ask you

to return a verdict which is in accordance with the law and which is fair to both sides.

Thank you.

Dr. Van Horn.

DR. PHILIP R. VAN HORN

called as a witness on behalf of the defendant; sworn.

The Clerk: Please state your name to the Court and to the jury.

The Witness: Philip R. Van Horn.

The Clerk: Is that "Philip" with one "l" or two "l's"?

The Witness: One "l."

Direct Examination

Q. (By Mr. Martin): Your name is Philip Van Horn? A. Yes, sir.

Q. You are a physician and surgeon licensed to practice your profession in this state, are you, Doctor? [118] A. I am.

Q. Where do you maintain your offices?

A. 411 - 30th Street, Oakland.

Q. And do you follow a specialty in the practice of medicine, Doctor?

A. Yes. Neurosurgery.

Q. Briefly, what is neurosurgery?

A. The diagnosis and surgical treatment of disorders and abnormal conditions of the brain, spinal cord and peripheral nerves.

(Testimony of Dr. Philip R. Van Horn.)

Q. Will you tell us, Doctor, as briefly as possible, what your medical background is.

A. Four years of premedical college work and a degree of Bachelor of Science from the University of Washington. Four years at Stanford Medical School, with an M.D. degree. A year's intern at Alameda County Hospital. Another year as assistant resident in surgical specialties in the same hospital.

Another year at Cowell Memorial Hospital, University of California campus. And about four years of general practice, during which I became more interested in the problem of the nervous system.

I then returned to the University of California where I was assistant resident in neurological surgery for a year and a half. Following that, into the Army, first at the [119] Army Medical Center at Walter Reed Hospital in Washington, D. C. From there I was sent as assistant chief of neurosurgery service with several large Army neurosurgical centers, the first being the Northington General Hospital in Alabama, the Kennedy General Hospital in Memphis.

Following the war, I returned and was assistant to an established neurosurgeon in Oakland until 1950, and I have been in independent practice since that time.

Q. Are you on the staffs of various hospitals in the East Bay, Doctor?

A. Yes, I am on, I believe, most of the staffs of the East Bay hospitals.

(Testimony of Dr. Philip R. Van Horn.)

Q. And do you belong to various organizations relating to your specialty?

A. Yes. The American Medical Association with state and county branches, San Francisco Neurological Society, the American Congress of Neurological Surgeons, Pan-Pacific Surgical Association.

I am chief of the Alameda County Hospital Neurosurgical Service, consultant to the Oakland Veterans Hospital, do consulting work there; do consulting work for the Crippled Children's, for the Girls' Vocational Rehabilitation organizations. I am assistant neurosurgeon for the University of California Student Health Service on the Berkeley campus, and in addition to that, I am in private practice. [120]

Q. All right, Doctor. And, Dr. Van Horn, did you at the request of my office have occasion to examine Mr. Harry McQueen, the plaintiff in this action? A. Yes, I did.

Q. And when did you first examine him?

A. February 2nd, 1959.

Q. And I presume that as part of your examination you took a history and then did a medical examination, is that right, sir? A. Yes, sir.

Q. Without going into great detail, Doctor, can you tell us what history you received which was significant as far as the neurological examination was concerned?

A. Yes. He stated he was sixty-four and had been in good health until May 29, 1957, when the incident occurred and he was thrown against a

(Testimony of Dr. Philip R. Van Horn.)

grab iron in a caboose, striking his right arm and head and face on a wall box. He was not unconscious but was somewhat dazed. But he has full recollection of the events leading up to the accident and the injuries themselves. He did not fall to the floor. He sat and rested until the train reached the yard, at which time he walked off the train and went into the office in the brakemen's room where he sat while the conductor made out the accident report and phoned the trainmaster and phoned a doctor, apparently.

His symptoms were described and the medication was [121] phoned to a drugstore. He was driven to the drugstore where this was given to him, and then he was taken home to Oakland.

He went to bed about 6:00 o'clock, after bathing his swollen right arm. Apparently he had severe pain in his arm, hand and head at that time, without much relief, so he called an ambulance and was brought to the Southern Pacific Hospital that night.

He was sent home the same night, about 2:00 o'clock in the morning, by taxi, and no bed was available in the hospital. The ferries were not running and he had to stay over in San Francisco. He spent a restless night and went home the following day.

He remained home and rested for a few days. After about a week he returned to the hospital and was allowed there as an outpatient being given physiotherapy and other treatment, but symptoms persisted and after about five months he was ad-

(Testimony of Dr. Philip R. Van Horn.)

mitted to the Southern Pacific Hospital, where he remained for five or six weeks, and during that time had a wide variety of diagnostic treatments and tests. He had no operation. He was released and still was given pain medication.

Q. Incidentally, Doctor, have you had an opportunity to review photostatic copies of those hospital records? A. Yes, I have.

Q. All right, then, will you proceed? You had asked him what his symptoms were at the time of his examination, is that correct? [122]

A. Yes, sir.

Q. What were his complaints at that time?

A. He stated that immediately after the injury he developed a headache which was more severe at night. This involved the back of his head and neck. He had a feeling of being very unsteady on his feet since the first night of his injury, and stated that this had been present ever since and had not changed. He felt uncertain in his walking and felt as though he might fall either way.

In addition, he had ringing in the side of his head and his hearing was not as good as it used to be.

His right arm was painful and swollen at first, but the swelling had subsided, but the thumb still felt numb and he occasionally had an electric sensation running down the forearm and entire hand, especially in the thumb and fifth finger.

His vision was a little impaired at first, but this cleared with glasses. He stated that his eyes felt

(Testimony of Dr. Philip R. Van Horn.)

dull and heavy. He felt somewhat restless but not particularly nervous. He was somewhat more forgetful than usual but was able to cope with ordinary situations.

Those were the essential complaints he gave us at that time.

Q. Was there anything significant in the past history that you asked him about, Doctor? [123]

A. He stated that—there was a little variation between what he told me and the hospital records, which I think is just normal because people don't always remember just accurately what went on.

He said that he did take one month off from work in 1955 for sinus trouble. Actually, I believe the records show that in 1949 he cut his head and this was sewed up, and six months later he began to complain of headaches and was hospitalized—general recurrent headaches, and was hospitalized until April 16th, from January through April, 1950, on account of these recurrent complaints, during which time he was given physiotherapy and, I believe, neck traction, and x-rays showed a good deal of arthritis in the neck, as well as a foreign body in the back of his—in the occipital bone, which was thought to be a bullet fragment. Nobody has yet found out what it is. I am still curious. I don't think that is particularly pertinent, however.

The essential thing was this one period in 1950 when he was hospitalized for periodic headaches and arthritic changes were shown.

Q. All right, Doctor. Then following the taking

(Testimony of Dr. Philip R. Van Horn.)

of the history and the complaints of Mr. McQueen did you perform an examination upon him?

A. Yes, sir. [124]

Q. And what were the significant findings, if any, at that examination?

A. He struck me as being a somewhat older man than his chronological age. He seemed a little bit more elderly than he should.

He was rather restless and nervous and moved his arms and hands in a rather fidgety manner.

His neck showed some limitation of extremes of motion, and he was rather apprehensive about moving his neck although there was a fairly good range of movement.

His hearing was a little diminished, but not markedly declined. He had no thickening of his ear drums, which would not be inconsistent with his age.

There was a small tumor on his chest which he had had for many years, which was not important. Blood pressure was somewhat elevated, and he did show some evidence of arteriosclerosis on the examination and also in the previous reports, where there was calcification in the large blood vessels, and shown in x-rays of the abdomen, which we associate with premature aging to a certain degree.

His back had full range of movement without complaining. He complained of dizziness on getting up from lying down, which is not uncommon with people of his age with arteriosclerosis.

Examination of the extremities, there was full

(Testimony of Dr. Philip R. Van Horn.)

range [125] of movement without complaint. Vague tenderness about his right thumb, although he used it quite well.

There was no measurable weakness or atrophy. In other words, the right hand was not wasted. The right hand actually measured larger somewhat than the left, which we expect of right-handed individuals.

There were no local muscle atrophies. Circulation was essentially normal except for moderate varicosities in both legs.

Memory, he seemed rational, cooperative and alert, but rather slow in his response. He seemed to weigh his replies rather carefully. His responses were accurate, but his memory for some dates seemed to be somewhat impaired. He was tense, nervous, and fidgety, as previously noted.

An examination of the cranial nerves, examination of the function of the nerves coming from the brain are not too important, not abnormal.

Examination of his motor function — by that I mean the motion function of his extremities — showed that he walked with a rather bizarre, strange wide base with an ataxic and unsteady gait. This struck me as being rather excessively wide based, and while he was somewhat unsteady, I had a feeling that this was somewhat exaggerated.

He tended to sway on Romberg testing. In other words, putting his feet together and closing his eyes, he had a tendency to sway, which is present with latent unsteadiness.

(Testimony of Dr. Philip R. Van Horn.)

On tests for motion coordination, the tests for the legs were not too well done. Heel to shin tests were poorly done. Finger to nose test was rather bizarre and wild, not constantly abnormal, and didn't quite fit in with his behavior when he was not being tested. In other words, on closing your eyes and touching your nose he had a tendency to go way off, and when reaching over he would automatically be more accurate, which is a thing we see in people who have a tendency to accentuate or perhaps to be more impressed with their disability than they should be. [127]

He did not show true (not understandable) signs. His grip appeared to be good except for some weakness in the right hand at times. Other times this was not apparent. Examination of the sensory system, that is, his ability to appreciate feeling of various types, showed a strip of sensory disturbance, diminished sensation, extending down the right forearm under the thumb. Also the tip of the fifth finger and over and above this there was some sensory loss over the entire right arm. That was less sharp; he felt pinprick less sharp on that than he did on the other arm. This didn't conform to definite, usual, normal limits which we see with organic problems.

Reflexes were essentially present and equal throughout for his age. I think that covers essentially the neurological features.

Q. All right, Doctor. On the basis of your examination and on the basis of the information which

(Testimony of Dr. Philip R. Van Horn.)

you had available to you from the hospital records, what impression did you form with reference to Mr. McQueen's difficulty?

A. Well, I felt that here was a man who had had previous trouble with his neck, had had headaches and a period of hospitalization in the past, who had x-ray evidence of previous stiffness and limitation of neck movement, and then had sustained an injury that jolted and jarred him, which there undoubtedly was unpleasant and distressing, but was not [128] severe enough to cause damage to the brain or spinal cord. We do see this type of injury produce flareup of local nerve and neck symptoms. I felt that there was possibly some flareup here to account for his neck and arm symptoms. The leg symptoms and unsteadiness impressed me as being rather functional. By that I mean of a nervous origin, in that a person of his age, all people when they tend to get a little older are less steady, and as time goes on they tend to get more unsteady. But I had a feeling that he was exaggerating this, because he did not show the organic signs we would see with damage to the long tracts in the spinal cord. In other words, had the spinal cord been truly damaged, we would expect at least to the degree where he was—as unsteady as he was, we should expect abnormal reflexes, definite sensory changes, loss in sphincter control, things that are not—not put on is not a good word—that are testable and they are not subject to the individual's control. He did not have any of these signs

(Testimony of Dr. Philip R. Van Horn.)

which we expect to find in organic damage. So I felt that there was at least a considerable element of nervous exaggeration of any underlying unsteadiness. He may have had, from age and arteriosclerosis, perhaps unpleasant blow to his neck and some flareup of his arthritic pains.

Q. And you mentioned, Doctor, that with organic damage to the spinal cord,—Now, first of all, what do you mean by [129] "organic damage to the spinal cord"?

A. Well, actually, destruction of nerve tissue. The spinal cord transmits the orders from the brain to the rest of the body. When there is actual organic damage and destruction of tissue and nerve cells in nerve tracts.

Q. And with such condition present, you mentioned there was a loss of sensation, for one thing. What accounts for that?

A. Well, not invariably, but when it is a significant degree, if the sensory tracts are involved, then we get various types of loss of sensation, depending upon the area involved. If it is very minute, it is possibly not testable, but in the severe degree, when you have loss of ability to feel pinprick, light cotton, position sense of the extremities, laboratory sensation, it is quite normal, for instance, to lose the ability to feel a tuning fork held against the bones of the leg. This actually disappears in many people as they get older. But it is a fairly sensitive one for sensory loss in the spinal cord. And his sensation checked out quite well.

(Testimony of Dr. Philip R. Van Horn.)

Now, the sensation in the arm followed a nerve root distribution. In other words, the nerve leading off the spinal cord, numbness over his fingers tended to follow the root distribution, which was not (balance unintelligible to the reporter). [130]

Q. I see. What root did that indicate, if it indicated any specific one?

A. Probably the sixth cervical.

Q. And this pain in the arm which he described; did he describe it as a constant thing or a variable thing?

A. Constant, fairly constant. It was severe in occurrence and with this, in addition, he had the swelling in the arm. So that it was a little difficult to know how much was from the neck and how much actually from the physical bruise on the arm, where apparently it was swollen. But he describes this as a constant pain in the arm, in the right thumb.

Q. Well, I take it, then, from what you have told us, Doctor, that you did not at that time have the impression of any actual damage to the cord itself. Is that correct?

A. Not that I could test. The problem of his unsteadiness is one which we always wonder about when a patient has nerve injury. We do see it in people of his age with arteriosclerosis and cervical arthritis, who tend to develop a certain amount of unsteadiness. I felt he was certainly not, perfectly normally, putting his best foot forward. In other words, he was accentuating his loss of balance when

(Testimony of Dr. Philip R. Van Horn.)

I saw him. In my report I said I thought this could have been, he showed some functional accentuation which could have been on an arteriosclerotic basis. Well, in other words, some of the [131] circulation of the spinal cord is impaired, and that will cut off functions, simply, as well as pressure or injury. And I felt that although there was or could be some element there which was overshadowed by this exaggerated phase and not accompanied by organic findings, I felt that was painful, yes.

Q. Well, following this initial examination in February of 1959, Doctor, did you have an opportunity to examine Mr. McQueen following the operation on his neck by Dr. Norcross? A. Yes.

Q. And when was your second examination?

A. May 4th, 1959.

Q. And, incidentally, with the consent of Dr. Norcross, did you have an opportunity to examine the records at Peralta Hospital pertaining to treatment of Mr. McQueen? A. Yes, sir.

Q. While there? A. Yes.

Q. All right. On your second examination of May 4th of 1959, Doctor, what were the findings on that occasion?

A. He stated that he was improved after the operation; that the pressure was all gone from his neck and that he had no more headaches. The arms do not ache and no more numbness, although a slight aching in the right thumb at times. States the thumb no longer jumps any more and the old numb [132] streak in the right forearm is gone.

(Testimony of Dr. Philip R. Van Horn.)
Balance and leg are good and he thinks he is back to his pre-injury status. At the present time his only complaint is a tired ache in the back of his neck and his neck feels stiff if he sleeps in the wrong position. Spends most of his time sitting and resting, most of the day. He hadn't recovered to the point where he wanted to drive his car yet. Thought he was still improving. But still had occasional pain and was taking about six or eight pain pills a day. On examination he showed a healed, recent, cervical, surgical scar with diffuse tenderness around the entire back of the neck and extending up into the upper shoulder. The limited neck movement about fifty per cent, and he was unable to extend beyond the vertical plane with this limitation. And he complains of pain on all extremes of movement, with moderate tightness and spasm of the neck muscle. In other words, he held the neck pretty stiff, which would not be unusual for a man two weeks out of the hospital after a neck operation.

The neurological examination showed no weakness, he had full range of movement in his arms, although he complained of pain in his neck on overhead movement of his arms. His balance was good and he stood well on either foot. There was minimal swaying on Romberg testing, which again is difficult to assess, because many people past fifty will sway somewhat with both feet together, looking up at the ceiling [133] and with their eyes closed. They will sway. This did not impress me

(Testimony of Dr. Philip R. Van Horn.)
as being excessive, associated with a (unintelligible), especially when compared with the other balancing tests.

Arms had full range of movement. Reflexes were present and equal. Possibly a little diminution in the triceps and ankle jerks, which were within normal limits. There were no sensory abnormalities and no other particular abnormalities, although his blood pressure was 170 over 108 (balance unintelligible).

Q. And with reference to the examination of the Peralta records, Doctor, what did you obtain as to additional information regarding procedures employed in this case?

A. This incident, Dr. Norcrooss had done a myelogram which showed evidence of deformity in the column of dye that is put in at the C-5-6 level, I believe, and spinal fluid protein and spinal fluid examination taken at the same time was normal. I bring that up because usually if there is severe or significant spinal cord damage we find reflexes in the spinal fluid which surrounds the cord. There were no abnormalities here. The myelogram showed this deformity. X-rays showed rather marked arthritis and stiffening of his spinal vertebrae and he was readmitted to the hospital after two weeks and laminectomy was done. The bony arch over the fifth and sixth cervical vertebrae was done (sic). Now, [134] that doesn't interfere with the motion or the joints or anything else, it simply moves the

(Testimony of Dr. Philip R. Van Horn.)

bony arch over the spinal cord, has nothing to do with bone or joint function.

The spinal cord was not remarkable on inspection and Dr. Norcross quite correctly cut the dentate ligaments to allow the spinal cord to (unintelligible). He found a ridge, a mass lying in front at the intervertebral disc level, which was most pronounced on the left, but present in a smaller degree on the right. And he apparently considers this to be a calcified herniated disc, which was causing spinal cord compression and which is treated by cutting these ligaments, allowing the spinal cord to ride backward and avoid any future pressure which might result from the bulge at the intervertebral ridge. Following this, he had a wound infection, and in his absence, April 11th, Dr. Siefert had to open up the wound. I talked to Dr. Siefert. The wound was—there was a little bit of a scare because the initial cultures taken, it was thought to be a very dangerous bacteria which required opening and draining. Actually, subsequent studies—and sometimes you can't tell for twenty-four hours, it takes a lab that long to get them; so that it was an ordinary staphylococcus. And it was quite sensitive to antibiotics, and that cleared up without trouble and was cleared five days later with proper healing.

Q. Well, Doctor, in connection with the bony prominence [135] that was found on operation, can you tell us what that condition is and what brings it about?

(Testimony of Dr. Philip R. Van Horn.)

A. Well, I don't know whether it was a bony prominence. He said it was a mass, a mass lying anterior. To explain, surgically, coming down, you are looking at the spinal cord surrounded in its sack with fluid, and in the spinal cord we can't pull it very far, and you are looking on a smooth spinal canal, you may see *a see* a ridge or bulge there. He, apparently, did not go outside to see the nature of this. We don't know. But, he took note that there was a ridge there. And unless we are sure it is lying laterally, we don't normally try to remove them, but we simply decompress them by cutting ligaments above, to cut them and relieve that pressure so it isn't necessary to go in front.

Q. Are such things common to find in connection with arthritis in the neck, Doctor?

A. Yes, ridges and bony spurs and outcroppings are very common with arthritis in the neck. In response to whatever causes arthritis, we get overgrowth of bone and these various ridges that occur, and they will cause deformities about the holes of the foramena. It deforms the holes through which the nerve roots leave the spinal canal and also the main canal. There can be irregularities and ridges. As a matter of fact, we see this condition with spinal cord compression; it occurs very commonly in elderly people spontaneously. [136]

Q. Incidentally, Doctor, with reference to the myelograms, did you have occasion to see the myelograms which were done? A. Yes.

(Testimony of Dr. Philip R. Van Horn.)

Q. I wonder if he could have those myelograms put in the shadow box for a moment.

The Court: It is entirely up to you. If you think it will be helpful. But if you are asking me about it, I would say I never have felt that anything is ever gained by looking at X-rays. The doctors say, "This thing here," and you see something, but it doesn't mean anything to you. I have looked at them by the hundreds, and unless you can see a clear line and see it is a fracture,—But the rest of it doesn't mean anything. I would rather have the doctor explain it than I would to look at X-rays. They never clarify anything.

(To the witness.) I hope I am not being too cruel to your profession.

The Witness: I have a feeling that way at times myself.

Mr. Martin: What I would like to have the doctor tell us about, your Honor, is just what these things that we see on the myelograms—just what you are looking at. That is what I had in mind.

The Court: Well, I don't say you shouldn't do that at all, but maybe the doctor can explain it.

The Witness: I might be able to describe it.

The Court: Would you rather use the X-ray?

The Witness: Well, it would only take a moment.

The Court: All right.

Mr. Martin: Do we have the myelograms, Mr. Clerk? I think they were especially marked. I don't think we need all three of them, Doctor. If you

(Testimony of Dr. Philip R. Van Horn.)

could just pick out the one which is most clear?

The Witness: The main thing that we see in the myelogram is this white shadow, is the heavy oil which casts a shadow on this X-ray. Now, this, I think the important thing to remember, we do see this defect here, and to a lesser degree you will note we see it pretty much in all of them. There is this little ridge. That can be defeating in that what we are—we are not looking at the two solids through. This patient is lying down, this is a heavy oil that floats along the bottom of this tube, floats along the bottom, so that you are looking down. Actually looking at it this way. And any small ridge across the bottom, it is like a boulder in a stream, will make a deformity. This is not a great big bar that is going all the way across the whole canal. This is merely a ridge in the bottom. As you see, he has certainly elsewhere (indicating), but more marked at this one level (indicating).

Q. You see more than one ridge there, Doctor?

A. Well, we see something out at these other levels, which is consistent with an arthritic back. And this, for instance [138] if a spinal cord tumor were present, where the whole canal wasn't completely blocked in, you would see this, with the patient lying down, practically standing on his head, it stops right there and is blocked off, but this is simply a stream on the bottom of the canal (sic). This does not outline the whole spinal cord or anything. Only the bottom of the canal, where there might be a small ridge which could be only an

(Testimony of Dr. Philip R. Van Horn.)

eighth of an inch high and still produce a great deformity.

Q. I see, Doctor. I take it between the time you first saw Mr. McQueen, your first examination, and the time of your second examination, there had been improvement in his condition, is that correct?

A. Yes, very marked improvement. In symptoms and findings that he showed.

Q. And do you have any opinion, Doctor, as to the—as far as the accident, I believe your record shows it to be May 29th, but I think the testimony in the case indicates it occurred May 27th, 1957; do you have any opinion with reference to the connection between the accident and the symptoms which later developed or which we saw in Mr. McQueen as time went on?

A. I think many of his symptoms occurred following the accident. I think he had a good deal—as I say, this is an unpleasant experience. He had neck pain increased from his arthritic neck. To what extent he had spinal cord compression, I am not entirely sure, I am not sure how much of that was a [139] normal tendency to exaggerate unsteadiness, feeling weak or uncertain, or whether it was organic. As I say, I am not sold on the organic, because it wasn't just supported by findings, but he did have pain, headaches, dizziness—not dizziness, I don't believe he mentioned that, but headaches, neck and arm pains, which could have been lit up by this blow. You wouldn't expect those to last forever. Normally, they subside. Their per-

(Testimony of Dr. Philip R. Van Horn.)

sistence over a long period of time makes one—usually we find it associated with tension, anxiety. A patient becomes concerned about his condition, he is worried, he is getting a little older, and that can keep symptoms going. Now, they were relieved by an operation to a marked degree. If there was any spinal cord compression, it is certainly not acting now, and in many respects his spinal cord is in better shape than it was before operation, and he no longer has the hazard from the old arthritis, as far as producing further cord compression, because the cord is loose from its attachments. I think he does have some neck pain which is going to take time to subside. I don't know how long.

Q. Incidentally, Doctor, does arthritis of the neck produce a limitation of motion in the neck of an individual? A. Yes, very commonly.

Q. I notice in the X-rays which were apparently taken at Peralta Hospital, they showed considerable arthritic change with some reversal of the curve at C-5, -6, and apparently an [140] arthritic fusion at C-6, -7. What do you mean by an arthritic fusion?

A. Well, in response to this, whatever it is, as I say, we don't know why arthritis, which is inflammation of the joints—the bone tends to put out spurs and eventually will fuse and stick together. We lose motion then, and he had this, as you say, these findings of rather severe arthritis in the neck.

Q. And by arthritic fusion, does it mean that one vertabrae is—— A. Apparently——

(Testimony of Dr. Philip R. Van Horn.)

Q. ——going with another?

A. ——joined to another, partly fused, yes.

Q. And incidentally, how many vertabrae are there in the neck? A. Seven vertabra.

Q. By seven, you mean cervical vertabra, down the neck?

A. From the neck to the shoulder—from the head to the shoulder.

Q. Well, with reference to the present symptomatology, Doctor, of neck stiffness and ache, has Mr. McQueen passed the convalescent stage of his operation and hospitalization?

A. No, I wouldn't think so.

Q. What do you think as far as the passage of time is concerned in connection with the present symptoms which he now has? [141]

A. Oh, I think I would not be at all surprised to have some one of these neck pains and stiffness and headaches for four to six months after an operation of this type.

Q. And incidentally, Doctor, as far as carrying on an occupation as a conductor, for instance, where he is in a caboose and doing mostly paper work and supervisory work, do you think that Mr. McQueen, after the convalescent stage is over, could return to that type of work?

A. Yes, I believe he could.

Q. As far as the spinal cord compression is concerned, I take it that the operation, whereas it did not remove the ridge, was designed so that the

(Testimony of Dr. Philip R. Van Horn.)

cord itself would not be held down or bound down tightly over the ridge, is that correct?

A. Yes.

Mr. Martin: I think that's all I have, your Honor.

Cross Examination

Q. (By Mr. Hepperle): Doctor, have you been certified as a specialist by the American Board of Neurosurgeons?

A. No, I have not taken the examinations. However, the United States Government requires at least board certificate or its equivalent to certify a man as a consultant. I belong to the College of Neurological Surgeons, which requires the same degree of training, and I have similar qualifications. I have not taken the examinations. [142]

Q. Now, you saw Mr. McQueen twice, once on February 2nd of this year, the other time May 4th; the first time before his operation, the second time after? A. That's correct.

Q. You didn't treat him? A. No, sir.

Q. And your examination was at the request of the Southern Pacific counsel?

A. That's correct.

Q. You reviewed the Southern Pacific Hospital record, and you yourself felt that the diagnosis listed there of lues or syphilis was not substantiated? A. Yes.

Q. And instead of spinal cord disease, you found on reviewing the Peralta Hospital record that the

(Testimony of Dr. Philip R. Van Horn.)

operation revealed that there was pressure on the spinal cord?

A. No, no, I didn't find the operation revealed there was pressure on the spinal cord. There was a ridge anterior. That may have been there for 20 years. It is possible to have a neck broken with an off-set of a half inch and no spinal cord compression at all. With an arthritic spine of this type, he could have had this ridge for a long time. And the spinal cord appeared perfectly normal. This is primarily a diagnosis which I make, which would be made by inference, and some of his symptoms, but there is no record of any spinal cord abnormality [143] on inspection, or actually on much organic testing.

Q. Do I understand, then, that it is your opinion that there was no pressure on the spinal cord here?

A. As I was trying to intimate, I find it difficult to be sure one way or another. I am a little puzzled by the fact that we did not, I don't believe, or the other examiners at the hospital, find objective findings which we usually see with real spinal cord pressure, in the way of objective findings and reflex loss, sensory disturbances, things of that sort.

Q. Well, that depends, doesn't it, Doctor, on what section of the spinal cord is affected?

A. Not necessarily.

Q. Well, for instance, the matter of atrophy;

(Testimony of Dr. Philip R. Van Horn.)

usually it results when the disc is pressing on the nerve root, isn't that right?

A. If atrophy occurring through the nerve root distribution, not on the cord.

Q. And both changes in sensation or muscle atrophy can result from pressure of a ruptured disc on the nerve root, can't they? A. Yes.

Q. And——

A. But only over the distribution of that root.

Q. Examining the diagram on the board, Doctor, if the pressure caused strain in the pyramidal tract of the spinal [144] cord, why then, you cannot demonstrate the pressure by clinical tests, isn't that right?

A. Not at all. There are definite tests for pyramidal tract loss; positive Dabinski, absent abdominal reflexes, spasticity, — those things, in a well-developed case. That is what you see in pyramidal tract disturbance or compression.

Q. Doctor, are you familiar with the book, "Lesions of the Cervical Intervertabral Disc"?

A. I have read it.

Q. ——by Spurling?

A. I have read it, but I am not familiar with every word of it.

Q. Well, would you disagree with this statement which accompanies the diagram which has been enlarged from this book and placed on the board——

Mr. Martin: I will object to counsel reading textbooks in cross examination.

Mr. Hepperle: I would like to submit authori-

(Testimony of Dr. Philip R. Van Horn.)

ties on that, your Honor, that it is proper in federal court.

The Court: Well, limit it to this question; I will overrule the objection.

Q. (By Mr. Hepperle): "Diagramatic representation of lines of stress in anterior spinal cord compression. The greatest strain is anterior, on tracts in which disturbance would not be demonstrable by clinical tests. [145] Secondary stress is directly on pyramidal tracts. The leg area is most lateral in pyramidal tracts, while the hand area is most medial. This explains the usual sparing of the hands in spinal cord compression."

A. Then if you spare the hand, how would we detect if the leg were not abnormal? What symptoms does he give for pyramidal tract dysfunction, other than spasticity, loss of control, abnormal reflexes? That's textbook basic neurology.

Q. Well, then, you disagree specifically——

A. I disagree with your interpretation of one remark taken out of that whole article.

Q. This is the complete description of the diagram, Doctor.

A. Perhaps of that diagram; but for instance, the spinal canal, the pyramidal tract, — unfortunately, we, in some of our surgical procedures, deliberately go in and cut the anterior portion of the cord to relieve pain below the body. If we get a sixteenth of an inch too high, we injure the pyramidal tract and we get spasticity, abnormal reflexes, loss of control, and there is no question about

(Testimony of Dr. Philip R. Van Horn.)

what you have got. And I think Spurling, who wrote the book, would be the first to admit it.

Q. The illustration, Doctor, comes from the Journal of Neurosurgery in an article by Kahn. But you specifically disagree with this sentence: "The greatest is anterior, on [146] tracts in which disturbance would not be demonstrable by clinical tests."

A. I don't disagree with that. What I am trying to say is, there can be minimal signs which would produce mild unsteadiness. But I had a man in my office who could barely stand, staggered all over in a wide-braced gait. That degree is usually associated with damage which you can demonstrate in the way of increased tone and spasticity. They are referring to minor degrees, where a patient is mildly unsteady, and mild degrees if spinal cord compression. I don't think any neurologist or any neurosurgeon in his right mind would say you can damage the spinal tract, the long tract in the cord, and not produce symptoms or clinical findings. That is basic. You don't do it. You would have malfunction, loss, paralysis, complete loss of sensation, loss of bladder control, loss of bowel control. And those are primarily in the anterior portion of the canal, of the cord. Now, that is if there is major compression. It is possible to have a mild degree, as I have maintained all along. But what I am puzzled about: Elderly people, we know spinal cord function starts to deteriorate gradually about 50. And a man of 80 years old is much less steady on his

(Testimony of Dr. Philip R. Van Horn.)

feet than you are, because part of his spinal cord function has been disturbed, and there are mild degrees which you cannot demonstrate with ordinary tests.

Q. In other words, Doctor, you don't believe there was [147] any spinal cord compression here?

A. No, I have not tried to give that impression. I have stated that if it were, it is on the relatively mild organic basis with considerable functional overactivity. It bounced right back to normal after surgery. Surgery, incidentally, does not always relieve this syndrome of spinal cord compression, which we see in elderly people, and this has.

The Court: The man would have gotten well without operation?

The Witness: That I can't say, your Honor.

The Court: What?

The Witness: I can't say. I think perhaps.

The Court: I was just trying to unravel all this by a direct question.

The Witness: Well, I don't mean to be vague about it. I am not clear in my own mind, except that he did not show the signs of severe spinal cord damage. He did show many of the signs you see when an accentuated or exaggerated form of—which is not uncommon in people. They put their worst foot forward when they are being examined, at times.

Q. I was coming to that, Doctor. Now, first you found Mr. McQueen to be fully cooperative with you on both examinations? A. Yes.

(Testimony of Dr. Philip R. Van Horn.)

Q. You did, did you not? A. Yes. [148]

Q. Next, you yourself formed an opinion that he was exaggerating, or you were suspicious of his complaints?

A. Yes, the organic findings didn't seem to bear out the degree of symptoms that he had.

Q. All right. Now, the purpose of the operation was to relieve pressure on the spinal cord, isn't that right? A. That's correct.

Q. All right; now Mr. McQueen said he was improved by the operation. A. Correct.

Q. Do you feel suspicious of that statement by him?

A. Not particularly. Many functional things are improved by operation. We see it countless times.

Q. Well, when the patient says that he is improved after the operation and the purpose of the operation was to relieve pressure on the spinal cord here, doesn't that, in your opinion, indicate that the patient is telling the facts?

A. I think he was telling facts. I don't mean to quarrel with that at all.

Q. You don't think he was exaggerating when he said the operation improved him?

A. No.

Q. As a matter of fact, people who are exaggerating or faking won't admit to improvement, will they?

A. Well, I don't mean exaggeration or faking. [149] There is a difference between deliberately doing something and bringing your worst foot for-

(Testimony of Dr. Philip R. Van Horn.)

ward, so to speak—showing how bad you are. I don't think he was consciously faking, no. Obviously, you cannot make a flat statement that malingerers always get worse and others get better. Unfortunately, in medicine it is not that simple. I have seen many people who have ailments of this type who are relieved, some with pain, where a sterile hypodermic of water has stopped the pain. They had real pain, but the mind seems to react, just as a suggestion. We have seen—I have a feeling that there was this considerable nervous, subconscious accentuation of disability. He was afraid, worried, anxious. The doctors told him they found a cause of the trouble, they corrected it, so he lost his anxiety; he is walking better. In either case, he is better, is over his symptoms. But in neither case, before or after, did he show objective reflex, motor signs; the electromyelograph tests for abnormal motor activity were normal. In those, none of the objective findings had changed one bit.

Q. Well, Doctor, if you assume that the patient is telling the truth, that this operation did improve his condition, doesn't that indicate the true diagnosis, that it was pressure on the spinal cord that was causing his difficulty?

A. Not at all. I think it is possible that the reassuring effect of the being told that he had what I am sure Dr. Norcross felt that he had, relieved it. But if there were an element of [150] tension and nervous accentuation, and then reassurance from the surgeon, it would relieve that essential. I

(Testimony of Dr. Philip R. Van Horn.)

don't know, I am perfectly willing to accept that he may have had some minor degree of spinal cord compression. If so, the spinal cord has been relieved and he is over his symptoms.

Q. Well, I am trying to understand your position here, Doctor. Is it your feeling, Doctor, that this operation was unnecessary?

A. Not at all, no. I think it was justified. I think it was a good move, and the result tends to prove it. I think his neck is better off now than it was even before the accident, in some ways. He had a neck which had burrs and ridges in it. It is decompressed and is free, now. [151]

Q. But, on the other hand, you feel there was no pressure on the spinal cord before operation?

A. There may have been some. I don't know how much; there was not enough to produce objective findings.

Q. On your first report, Doctor, you stated in your opinion—first, you didn't make a definite diagnosis in your first report, did you? Rather, you expressed an opinion that this situation was suggestive of degenerative central——

A. Degenerative central nervous system disease, and the nervous system includes the spinal cord.

Q. Yes.

A. "Degenerative central nervous system disease with functional accentuation."

Q. Now, again, if the operation improved the man's condition, wouldn't that tend to point to

(Testimony of Dr. Philip R. Van Horn.)

pressure on the spinal cord rather than a degenerative condition?

A. For the same reason I have given before, the mere fact that something follows something doesn't prove that that is the thing that did it. It may have helped. There may have been some element there, as I say.

Q. Well, an operation wouldn't help a degenerative condition, would it, Doctor?

A. I have seen operations help hysterical people, nothing wrong with them and they got over it. [152]

Q. Well, you don't suggest that Mr. McQueen is hysterical?

A. No, but I say there is a tendency toward nervousness, apprehension, and to make these symptoms he may have had worse. He is a man of an age where he might have some unsteadiness to start with. I don't know whether he had spinal cord compression. Spine, he could have. If so, it wasn't to a marked degree. He did show signs of accentuated, exaggerated unsteadiness without supporting objective findings.

Q. Well, Doctor, this particular operation performed here would not improve a degenerative condition of the spinal cord, would it?

A. Not normally.

Q. Now, you mentioned this matter of function.

A. Well, I spent about an hour explaining my position on that——

The Court: You say it would take an hour?

(Testimony of Dr. Philip R. Van Horn.)

A. No, I say I have been using about an hour trying to make this point here clear.

The Court: For the moment you kind of scared me.

A. Functional, I don't mean he is malingering. I don't think this is a deliberate thing. But I think everybody who has had any experience at all with illness knows that there is an emotional condition of the patient, his fear, his apprehension, his whole reaction to his particular symptoms [153] will color or influence that underlying problem, and sometimes even produce symptoms and findings.

Q. Now, isn't it common, Doctor, to find a functional element or a functional overlay when a patient has been subjected to a long period of pain and difficulty?

A. Yes. Depending on the individual, of course.

Q. Yes. In other words, it is quite common in amputees that there develops in addition to the injury and the amputation a functional element on top of the injury?

A. Yes, but again subject to wide variation.

Q. Now, you don't feel, then, that the improvement in the patient's symptoms following the operation indicates that this was a cord compression rather than a disease or a degenerative process?

A. I don't think I can necessarily prove that it was entirely, no. For instance, the operative note, the compression was primarily on the left, in which case we should have more compression involving the right side. There should have had some pain or

(Testimony of Dr. Philip R. Van Horn.)

temperature, fibrous cross-over, should have had some disturbance in front and sensation on the right side of his body.

If he were involving a—if it were truly a—(inaudible due to noise in courtroom)—why he didn't have more pain in the left arm. It is smaller on the right where he had most of the arm injury. There are inconsistencies [154] here which don't fit.

Q. You mentioned, Doctor, Mr. McQueen being struck on the head in 1949 by a rock. Did you know that he had it sewed up and returned to the job without loss of time there? A. Yes.

Q. And that it was some six months later that he was sent to the Southern Pacific Hospital by Dr. Jones? A. Yes.

Q. And the transfer slip that Dr. Jones filled out for him at that time, January 16, 1950, states that Mr. McQueen complained of "post-influenza weakness. Off since October 8, 1949."

A. Yes. I didn't mean to give the impression I thought this blow on the head was a direct consequence—direct cause of his later hospitalization. I am sorry if it came out that way.

Q. In other words, you wouldn't expect that six months after being hit with a rock he would develop a headache as a result of being hit by the rock? A. No.

Q. And you mentioned that while he was in the hospital he had some headache. Did you also notice that traction did not help him in that connection?

A. I don't remember that.

(Testimony of Dr. Philip R. Van Horn.)

Q. If it were an arthritic—— [155]

A. I will take your word for it.

Q. If it were an arthritic headache from his neck, you would expect traction to help it, wouldn't you?

A. Sometimes. Sometimes not.

Q. At any rate do you have in mind that the neurosurgeon that suggested that the traction be discontinued and a medical opinion obtained?

A. Could be.

Q. Did you have that in mind, Doctor?

A. No. I am not sure that I know what you are getting at.

Q. Well, calling your attention to the entry in the record that on April 12th, 1950, that he returned from his leave, he had no headaches, no dizziness, he felt fine, he wanted to return to duty, was given a return to duty, and his weight had increased up to 192 pounds from the 176 pounds that it had been, and if the patient had no further trouble with headache, why, you wouldn't say that he was disabled as of that time or up to the time of this accident that we are dealing with in this case, would you, Doctor?

A. No. I said he was in good health at the time he reported this injury, stated he was.

But as far as the traction, there is a note that he was treated with physiotherapy from January to April, and they don't do that for headaches or head problems. You [156] give physiotherapy because of

(Testimony of Dr. Philip R. Van Horn.)

neck and skeletal and bony problems. Chiefly arthritis, I believe.

Q. Well, they looked for a physical and a medical cause of the headache and never did find it, did they?

A. I don't have all the records, but I know he was treated with physiotherapy, which is what they usually use for skeletal or arthritic type of pain.

Q. Now, did you yourself on either one of your examinations note any vesiculations in Mr. McQueen's legs or at the base of his thumb?

A. No, I did not.

Q. If I understand your testimony and your written report, you can't now at this time evaluate the permanent residuals and their degree in this case?

A. As far as his head and his neck symptoms are concerned, yes.

Q. You would want to wait at least another four to six months and re-examine him at that time?

A. Yes.

Q. Now, is it your opinion, Doctor, that arthritis disabled Mr. McQueen simultaneously with his accident of May 29th, 1957? A. No.

Q. As a matter of fact, lots of people his age have arthritis without symptoms? [157]

A. That's right.

Q. And if they sustain an accident such as this, for the first time they have pain and difficulty?

A. That is correct.

Q. And if Mr. McQueen had been working regu-

(Testimony of Dr. Philip R. Van Horn.)

larly over the years before this accident, making over $7,000 a year as a conductor and brakeman, you wouldn't say that he was disabled before the date of this accident, May 29th, 1957?

A. Other than this period of 1950, I believe, when he was off from January to April.

The Court: Aside from that.

Q. (By Mr. Hepperle): Aside from that.

A. That's right.

Q. In other words, from the time he went back to work in 1950 until 1957 you would not say he was disabled during that period of time?

A. Apparently not.

Mr. Hepperle: Thank you. That is all.

Redirect Examination

Q. (By Mr. Martin): Just one matter, Dr. Van Horn: Dr. Norcross on his first examination found that a troublesome problem in this particular instance was the presence of fasciculation in both calves.

"These indicate that there may be some degenerative [158] disorders of the nervous system not heretofore recognized."

Was that substantially your view on your first examination, Doctor?

A. Well, I didn't find it. I didn't notice fasciculations, nor apparently did anybody else, in the calf. All this period of hospitalization when he was looked at by quite a number of competent people who were looking for diagnostic points of that

(Testimony of Dr. Philip R. Van Horn.)

type. There may have been there a fissiculation, which are bursts of muscle quivering. They are not always—they can occur from fatigue and irritability, and sometimes even from an organic standpoint, they tend to come and go.

But at least at the time that I saw him, and on the record from the examination of others, nobody noted it other than some quivering of the thumb, which I think was not a true fasciculation. It would be rather unusual to have true fasciculation or root compression. Usually we see it in the long muscles of the legs and trunk.

Q. I realize, Doctor, we are still in this period of convalescence from the operation, but based upon past experience in similar cases, in your opinion, is there going to be further improvement here?

A. Yes, I think he is going to improve.

Q. And do you feel that Mr. McQueen will be permanently disabled as a result of this thing?

A. No, I don't think he should be. Many people have had this operation and are back to work. I don't think he should go back to work as a heavy worker, but from the type of work he is doing, sedentary desk work, I see no reason why he shouldn't.

Q. Incidentally, you mentioned an electromyograph was started on the arm in this case, Doctor. I note that that is in the hospital records. For general information, what is an electromyograph?

A. It is an electrical test, a measurement of the electric current produced by any muscle. Any

(Testimony of Dr. Philip R. Van Horn.)

living tissue, as a matter of fact, will cause a minor electric current which can be measured. They are more familiar in an electro-cardiogram or heart measurement of heart currents. We can do that with the various muscles.

A paralyzed muscle, for instance, will show a different electric current than one that is normally active. But it is subject to wide variations, and unless there is an elaborate research setup you can't go on one or two tests of this type.

Q. That test, as far as it went, was normal, was it, Doctor?

A. That was perfectly normal, meaning only that the muscle testings were normal.

Mr. Martin: Thank you, Doctor. I think that is all. [160]

Recross Examination

Q. (By Mr. Hepperle): Doctor, the purpose of the myelogram performed by Dr. Norcross at Peralta Hospital was to determine whether there was pressure on the nerve roots of the spinal cord to help in diagnosing as to whether this was a degenerative condition or whether it was something that could be demonstrated by the myelogram, isn't that right? A. That is correct.

Q. Do you disagree with the radiologist at Peralta Hospital that this was a ruptured disc in the neck?

A. That is not a radiographic diagnosis. The radiologist doesn't make pathologic diagnosis.

In other words, we see ruptured discs which will

(Testimony of Dr. Philip R. Van Horn.)

act like spinal tube tumors. No radiologist will—they can make an educated guess. I think he describes an indentation and deformity which you can see there and concludes it could or probably is due to a disc.

Q. Well, what he says, "posterior protrusion disc 5-6," that means a ruptured disc, doesn't it?

A. Is there a question mark after that, sir?

Q. Yes, there is.

A. All right, that is your answer on that.

Q. It is your opinion, then, that there was no rupture of the disc here? [161]

A. I don't know. I wasn't there at surgery. The man who was there did not treat it as a true soft rupture, he treated it as a hard calcified rupture which had either been there a long time or was an arthritic spur. Beyond that I can't say. I would have done the same thing if it were my patient, probably.

Q. Well, this is a common way of treating a condition where there is room to sever the ligaments to give the spinal cord more room, isn't it?

A. Yes.

Mr. Hepperle: That is all.

The Court: No more, now.

Mr. Martin: No more, Judge?

The Court: No. Each of you has had two cracks and that is enough. It doesn't elucidate the matter, anyhow.

Mr. Martin: All right.

(Witness excused.)

Mr. Martin: I should like at this time to offer in evidence Rule 2061 of the Safety Rules of the Southern Pacific Company governing employees in train, engine and yard service, which rules were effective at the date of this accident.

Mr. Hepperle: To which we object, your Honor, on the ground that——

The Court: May I have it so I can see what it is? [162]

Mr. Martin: 2061, your Honor. (Handing document to the Court.)

The Court: What is your objection?

Mr. Hepperle: We object, your Honor, upon the ground previously stated in my motion to strike, that this would inject into this case the doctrine of assumption of risk, which is abolished by the statute, Section 54 of 45 U.S.C.A., and is a device designed to enable the defendant——

The Court: I think, counsel,—I don't want to interrupt you, but I think there is a perfectly good objection to this rule, but not the one you are making.

I am not taking sides, but I don't see why we have to get into an elaborate discussion of the question which you raise. I would hold that this rule is not applicable because there is no evidence that the train was entering or leaving grounds at the time, or was approaching where a stop is to be made or speed reduced, and therefore it is not applicable.

Mr. Hepperle: Yes, your Honor.

The Court: I would see no objection to the intro-

duction of the rule if the evidence in the case would make it applicable, Mr. Martin.

Mr. Martin: As I remember the evidence, your Honor, they were entering the Oakland Yard.

The Court: Oh, no, no. He said they entered the [163] yard at Richmond, two miles, and they had made a stop and were proceeding on. There is nothing to show that they were at that time entering or leaving a yard or approaching a place where a stop was to be made or speed reduced.

Otherwise this rule, if I were to permit this rule in evidence, it might have applicability. I think it would be error and it might be erroneously availed of in the absence of basic evidence to sustain it.

If there were evidence of that type in the case, then the rule might be applicable. I am not going to rule on that. That would be speculative.

I will sustain the objection on the grounds that I have stated.

Mr. Martin: Very well, your Honor.

The Court: I think you had better have that given to the reporter, Mr. Martin, so he can know what the rule is.

Mr. Martin: Thank you, Judge.

The Court: Perhaps have it copied so that your objection will apply to something that is in the record.

The Clerk: We can mark it for identification.

The Court: Whichever way you wish.

Mr. Martin: I wonder, your Honor, if counsel might approach the bench for just a moment?

The Court: Certainly.

(Consultation at Judge's bench off the record.) [164]

The Court: Members of the jury, I said to you this morning that I thought you would get the case this afternoon, but no one can foretell how long doctors are going to take. That is partly their fault, partly the judge's fault, partly the lawyers' fault, so we won't blame anybody. But they do take a long time.

If we had gone on now and the lawyers had argued the case and I were to instruct you, you probably wouldn't get the case before dinnertime, and that is too late to keep you. Many of you come from places outside San Francisco, and I don't think that is the right thing to do.

So instead of keeping you here now to listen to the arguments, you will have to come back tomorrow morning anyhow to get the case.

There may be very brief testimony in the morning, if there is any at all, and the case will then be argued and you will have the case before noontime tomorrow. I think that is better for you than trying to keep you here late tonight. Don't most of you agree to that? I can see that you do.

So will you please come back tomorrow morning at 10:00 o'clock and we will finish up then.

(Thereupon the jury left, and proceedings on settling of instructions were had outside the presence of the jury, after which an adjournment was taken to tomorrow, Wednesday, June 3, 1959, at 10:00 a.m.) [165]

Wednesday, June 3, 1959, 9:30 a.m.

The Clerk: Harry J. McQueen v. Southern Pacific Company, further trial.

Mr. Martin: Your Honor, there is just one matter I would like to clear up with Mr. McQueen which will take just a couple of questions. There is some question in my mind as to where this stop occurred and I would like to clear that up.

Mr. McQueen, would you take the stand for a moment?

HARRY J. McQUEEN

recalled; previously sworn.

The Clerk: Let the record show Mr. McQueen has been sworn in this case.

Cross Examination—(Continued)

Q. (By Mr. Martin): Mr. McQueen, if I recall the testimony you gave earlier, you made a stop in the yard there at a signal and got out and observed the signal, is that correct?

A. You say I got out?

Q. Well, you made a stop for a signal before the emergency stop that was made, is that correct?

A. Yes, we made a stop.

Q. All right. Now, can you tell us which signal that was? [166] Was there any identification for it, or can you tell us where it is located?

A. Well, it is located at what they call the Desert Yard.

Q. The Desert Yard? A. Yes.

(Testimony of Harry J. McQueen.)

Q. And then was it the next signal where the emergency stop was made after that one?

A. Yes.

Q. And how would you describe that signal? In railroad language, what is it called?

A. Well, it's a mask signal.

Q. A mask signal? A. Arms on it.

Q. Does it have any identification? That is, is it near any particular point in the yard to describe its location?

A. I don't know. Word that again, please.

Q. I say, is there any way that someone who was familiar with that yard could identify where the signal was? Was it the only mask signal in the yard? A. Oh, no.

Q. Is this first signal you stopped at, the Desert signal, is that the only signal in the yard known as the Desert signal?

A. Well, I said the signal was located at the Desert—it isn't a Desert signal; it is just located at the Desert [167] crossing.

Q. At the Desert crossing?

A. Yes, that's right, where the highway crossing goes into the desert. I am just defining where the signal was located.

Q. That is what I was getting at. And that is the only signal that is at that crossing, is that correct?

A. On that track, yes, one on each track.

Q. And the track you were operating on, was it on the main line or was it off the main line?

A. It is known as 1 and 2 track.

(Testimony of Harry J. McQueen.)

Q. 1 and 2? It would not be the main line, then, is that right? A. No.

Q. You had gone off the main line at some point some distance before you got here, is that correct?

A. That is right.

Q. And so we can clear up the matter, the signal where the emergency stop was made was the next signal after the signal at the Desert crossing, is that correct?

A. The signal I speak of, yes, at the Desert crossing.

Q. Yes. And this signal where the emergency stop was made was the next signal after that?

A. That's right.

Mr. Martin: Thank you. That is all I have. [168]

(Witness excused.)

Mr. Martin: Call Mr. Turner.

EUGENE TURNER

called as a witness on behalf of the defendant; sworn.

The Clerk: Please state your name to the Court and to the jury.

The Witness: Eugene Turner.

Direct Examination

Q. (By Mr. Martin): Mr. Turner, you are employed by Southern Pacific Company, are you?

A. Yes, sir.

Q. And what is your position with the company?

(Testimony of Eugene Turner.)

A. I am a train master with the Southern Pacific Company.

Q. And what is a train master?

A. Well, the train master is an individual on the railroad that is assigned to a portion of the district that has charge of the direction and movement of the train.

Q. What has been your—how long have you been with the railroad, Mr. Turner?

A. Twenty-four years.

Q. And as far as your background is concerned, what jobs did you hold before you became train master?

A. I was a brakeman for six years and a conductor for nine years and I have been a train master for nine and one-half [169] years.

Q. What division of the railroad are you attached to?

A. I am attached at the present time to the Niles District of the Western Division.

Q. Does the Western Division include the West Oakland Yard? A. Yes, sir.

Q. And has all your experience as brakeman, conductor and train master been in the Western Division? A. Yes, it has.

Q. Are you familiar with the West Oakland Yard, Mr. Turner? A. Yes, I am.

Q. Mr. Turner, in your capacity as brakeman, conductor and train master, have you had frequent occasions to ride freight trains aboard cabooses?

A. Yes, sir.

(Testimony of Eugene Turner.)

Q. And have you had experience in riding trains on cabooses where emergency stops have been made? A. Yes, I have.

Q. Incidentally, we have here some photographs of a caboose. I will show you Defendant's Exhibits A and B. Have you had experience in riding on cabooses of the general nature of the one you see there in the photograph? A. Yes. [170]

Q. Is that a common type of caboose on the railroad? A. Yes, it is.

Q. And where an emergency application is made on a freight train, emergency application of air on a freight train of some ninety-odd cars—ninety-two cars—at a speed of six to eight miles an hour, can you tell me, based upon your experience and from an experienced man's standpoint, is there any indication in the caboose that an emergency application has been made? A. Yes, there is.

Q. What indication do you get in the caboose?

A. Well, you can hear the snapping sound of the piston in the brake equipment as it goes into the emergency application. You can also hear the wheels, the shoes of the brakes as they clamp up against the wheel.

Q. Now, an emergency application of the brakes, can you tell me whether or not that is the quickest application that can be made?

A. Yes, it is.

Q. And this sound that you hear, can you hear that over the noise of the running of the train at a speed of six or eight miles an hour?

(Testimony of Eugene Turner.)

A. Yes, definitely.

Q. Are you familiar with the term known as "slack action"? A. Yes, I am. [171]

Q. Will you tell us generally what slack action is?

A. Well, slack action to a railroad man is the bunching of cars in a train. By that I mean that one car couples into the car ahead of it until all the cars are up against one another and there is no movement between the engine and the caboose.

Q. And where the stop is made from the head end, does that bunching of cars go from the head end to the rear or vice versa?

A. From the — Well, it would naturally start with the head car going against the engine and so on, until the caboose is against the next car—next car ahead of the engine.

Q. And following an emergency application of air, this noise that you have told us about of the piston, is that a brake piston of some kind?

A. Yes, that is the piston in the brake equipment that applies the brakes, whether they are in emergency or in service application. In service application you never hear the equipment when it is being applied.

Q. But in emergency application, I take it that it is applied more rapidly than it is in a service application?

A. That is correct. It is applied more rapidly and makes a loud noise.

Q. And with a ninety-two car train, with the

(Testimony of Eugene Turner.)

noise of the piston which actuates, would that noise be heard before [172] or after the occurrence of slack action?

A. That would be heard before, depending on the movement of the train.

Q. And at a speed of six to eight miles an hour in a ninety-two car train where an emergency application is made from the engine, can you tell us from your experience about how much time would elapse between the time the piston is applied and the time the slack action occurs in the caboose?

A. Well, at that rate of speed it would be approximately between four and eight seconds.

Q. Interval of time between, is that correct?

A. That is correct.

Q. You have heard the description of where this stop was made here, that is, the signal next—in a westerly move the signal following the signal at the Desert crossing? Are you familiar with the Desert crossing, Mr. Turner? A. Yes, I am.

Q. About how much distance separates those two signals, if you recall?

A. Oh, I would say approximately forty cars.

Q. You use the term "cars." Is that the way you measure distance?

A. Yes, that would be the distance in freight cars based on forty feet per car.

Q. I see. So it would be forty times forty, sixteen [173] hundred feet, is that right?

A. That's right.

Q. With reference to the crossing, assume an

(Testimony of Eugene Turner.)

emergency stop was made at the crossing next after the Desert crossing, can you tell us within the term "yard" where within the West Oakland Yard that would take place, generally speaking?

The Court: Where what would take place?

Mr. Martin: The emergency application at the signal, your Honor.

The Court: In other words, you want to know where that signal is in the yard?

Mr. Martin: In the yard, yes, sir.

The Witness: Well, that signal is about a third of a mile from the point where the train actually goes into the yard tracks.

Q. (By Mr. Martin): And by "yard tracks" you mean what?

A. Well that is the point where the train is yarded and where the train is worked by car men and broken up and the cars are switched for placement in industries.

Mr. Martin: I think that is all I have. You may cross examine.

Mr. Hepperle: No questions, your Honor.

The Court: That is all.

(Witness excused.)

Mr. Martin: At this time, your Honor, the [174] defendant will again offer Rule 2061, which your Honor has already seen.

Mr. Hepperle: We renew our objection, your Honor, on all the grounds heretofore stated.

Mr. Martin: I believe the testimony of this witness would make the rule applicable, your Honor.

The Court: I am inclined to sustain the objection.

Mr. Martin: All right. One thing, your Honor: This rule does not appear in the record and I would like at an appropriate time, in the absence of the jury, to read it into the record for the reporter.

The Court: Yes, we mentioned that yesterday.

Mr. Martin: I tried to do that, your Honor, but he said there was no way of doing it without some formal motion.

Mr. Hepperle: Why not mark it for identification?

The Court: Mark it for identification so that there is no question that the record shows what rule you have offered.

Mr. Martin: Very well, your Honor.

(Rule No. 2061 was thereupon marked Defendant's Exhibit C for identification.)

[See page 187.]

Mr. Martin: I believe that will complete the defendant's case.

Mr. Hepperle: Mr. Martin has been able over the [175] evening recess to check the figures on wage increase, your Honor. I offer these two groups as plaintiff's exhibit next in order.

Mr. Martin: I will agree that those figures check out, although, if your Honor will take a look at them, I don't think that they are especially illuminative in this case.

The Court: It shows the basis of pay in May 1957, November 1957, May 1958, November 1958. I don't understand what the—Strike that out.

This pay base for the time stated is for freight service at the Western Division. I don't understand the conductor's—(inaudible to the reporter).

Mr. Hepperle: Suppose we eliminate that, your Honor.

The Court: Well, you can make such comments on it as you want. Let the basis of pay for freight service be admitted. That will be exhibit what?

The Clerk: Plaintiff's Exhibit 5 introduced and filed into evidence, your Honor.

(Basis of pay was thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

[See page 186.]

Mr. Hepperle: Plaintiff rests, your Honor.

The Court: Both sides have rested. Are you ready to argue the case now, gentlemen? [176]

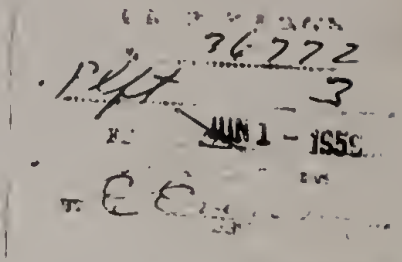
Mr. Martin: Yes. Before we argue, your Honor, I wonder if we might have a brief word with you at the bench?

The Court: Certainly.

(Consultation between Court and counsel off the record.) [177]

[Endorsed]: Filed August 25, 1959.

McQueen v SPCo



Past Earnings

1954	7266.34
1955	7077.14
1956	7385.70
1957-Jan	492.62
Feb	579.13
Mar	647.49
April	742.04
May	738.56

3199.84 – mo average 639.96 – (for 12 months 7,679.52)

Wage loss to date	15,359.04	.00 *
Peralta Hospital	1,359.07	15,359.04
	11.72	1,359.07
	40.00	11.72
		40.00
DR Morton B Cz-/ton (Anesthesia)	90.00	90.00
		60.00
Nurse Fagerstrome	60.00	20.00
		100.00
Nurse De Chantal	20.00	100.00
		2.00
Nurse Daniels	100.00	50.00 ~~25.00~~
		750.00
Nurse Dempsey	100.00	170.00
		~~18,086.83~~ *
Medical Center Clinical Lab	2.00	18,136.83
DR Norcross		
~~Myelogram~~	~~50.00~~	
Laminectomy	750.00	
DR H. Jack Siefert	170.00	
DR Wm Chew	———	
	~~18,086.83~~	
	18,136.83	

PLAINTIFF'S EXHIBIT No. 3-A

William B. Chew, M.D.
419 Thirtieth Street
Oakland 9, California
GLencourt 1-7414

May 29, 1959

To: Hepperle & Hepperle
Attorneys at Law
1956 Hobart Building
San Francisco 4, California

For Professional Services Rendered
Harry McQueen

May 6	Diagnostic Consultation and Examination	$25.00
	Laboratory	14.00
May 8	Biopsy-Bone marrow	30.00
May 12	Office	7.50
May 12	Lab	1.00
May 18	Lab	3.00
May 22	Office	7.50
	Lab.	3.00
	Lab.	4.00
		$95.00

[Endorsed]: Filed June 2, 1959.

PLAINTIFF'S EXHIBIT No. 5

BASIS OF PAY

Western Division—Western District
Conductor's Passenger Guarantees

January 1, 1957

Passenger Service	Monthly Guarantee
Oakland Pier—Sacramento via Suisun	$537.70
Oakland Pier—Gerber	537.70
Oakland Pier—Fresno	537.70
Oakland Pier—Sacramento via Livermore	532.60
All Other Passenger Service	530.70

May 1, 1957

Oakland Pier—Sacramento via Suisun	$544.90
Oakland Pier—Gerber	544.90
Oakland Pier—Fresno	544.90
Oakland Pier—Sacramento via Livermore	539.80
All Other Passenger Service	537.90

November 1, 1957

Oakland Pier—Sacramento via Suisun	$537.70
Oakland Pier—Gerber	573.70
Oakland Pier—Fresno	573.70
Oakland Pier—Sacramento via Livermore	568.60
All Other Passenger Service	566.70

May 1, 1958

Oakland Pier—Sacramento via Suisun	$583.30
Oakland Pier—Gerber	583.30
Oakland Pier—Fresno	583.30
Oakland Pier—Sacramento via Livermore	578.20
All Other Passenger Service	576.30

November 1, 1958

Oakland Pier—Sacramento via Suisun	$602.50
Oakland Pier—Gerber	602.50
Oakland Pier—Fresno	602.50
Oakland Pier—Sacramento via Livermore	597.40
All Other Passenger Service	595.50

[Endorsed]: Filed June 3, 1959.

DEFENDANT'S EXHIBIT "C"

(For Identification)

Southern Pacific Company (Pacific Lines) Safety Rules—Governing Employes in Train, Engine and Yard Service, Effective November 15, 1952.

* * * * *

2061. On trains entering or leaving yards, or when approaching places where stop is to be made or speed reduced, take necessary precaution, particularly in cabooses, to avoid injury which might result from sudden unexpected movement.

* * * * *

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Proceedings On Settlement of Instructions Had Outside The Presence of The Jury:

June 2, 1959, 10:00 A.M.

Appearances: For the Plaintiff: Messrs. Hepperle & Hepperle, by Robert R. Hepperle, Esq. For the Defendant: Messrs. Dunne, Dunne & Phelps, by John Martin, Esq. [1]

The Court: I assume the case will go to the jury with very little change in the record as it stands now. Do you want any discussion of instructions now or would you rather wait until morning?

Mr. Hepperle: I would prefer it now, your Honor.

The Court: I assume all that we would have to prove in the way of evidence would be some figures that you have on earnings or some witness that might testify about the matter of brakes or something of that kind?

Mr. Hepperle: Yes, your Honor.

The Court: Under those conditions, why, I will just give the usual instructions, which are very simple instructions, in this case. I don't see any basis for giving any instructions on contributory negligence. I don't see any basis, really, for doing much more than telling the jury that the main point in the case is the amount of damages.

Mr. Martin: The only thing I had in that regard, your Honor,—of course I hadn't anticipated that this rule would not go in—was that there was testimony in the case from the fireman that when an emergency application of air is made there is a noise which is heard in the caboose, which precedes the actual slack action, and whether an experienced brakeman of Mr. McQueen's character, assuming that such a warning was present, although I realize there is a conflict on that in the evidence, but assuming such a warning was [2] present under the testimony of the fireman, whether he should have taken any steps by use of the grab iron.

The Court: Well, of course the fireman, as I recall it, did not testify there was any appreciable difference in time and the conductor, who was in the rear, said it was either simultaneous or practically simultaneous, or some such language as that.

Mr. Martin: I am aware of that, your Honor.

The Court: I don't think there is any evidence to warrant giving an instruction as to contributory negligence, and on the state of the record I think it would be unfair to give such instruction in this case. There is no evidentiary matter upon which to base the rule of contributory negligence.

There is a perfectly good rule that should be given in any case where there is any evidence that the jury can evaluate to which the rule of contributory negligence can apply, but I don't see that there is any in this case, and in the present state of the record, Mr. Martin, it seems to me that I should tell the jury, just give them the ordinary rules of how to evaluate testimony, and tell them that on the present state of the record there doesn't appear to be any conflict in the testimony on the question of liability and that they should devote themselves to considering the amount of damages, because if I gave some other instruction that [3] would lead them to the question of determining liability and they brought in a verdict in favor of the defendant, I would feel that I would have to set it aside. There is no evidence in the case upon which they can make a finding.

Mr. Martin: Well, on contributory, of course they couldn't bring in a verdict for the defendant.

The Court: I beg your pardon? Oh, you say they couldn't——

Mr. Martin: Under the F.E.L.A., no.

The Court: So I figure that the simplest thing for me to do is to instruct the jury very simply on this case except to give them the rules of the damages, as to what they can take into account in the case of damage, how to evaluate the evidence in that regard.

It seems to me that while I didn't necessarily give them an instructed verdict on liability, I think I ought to tell them that there doesn't appear to be any conflict on the question of the causation of the accident, and that under those circumstances the jury should spend their time determining the amount of damages. I don't like to give them an instructed verdict, but I think the case justifies it.

Mr. Hepperle: We do think, your Honor, purely for the education of the jury in view of the claim made by counsel in his opening statement, that there should be a statement that in addition to the negligence of the tower man [4] being admitted, that the plaintiff does not assume the risks of injury from the negligence of the tower man.

The Court: I think you are entitled to that. I just give a few instructions very generally and very simply as to the Federal Employers' Liability Act and regarding the liability of the employer and employee under that because I think the jury should know the setting of the case, because they might wonder why they are hearing a suit by the employee against the employer. They live in a state where those things are unknown. The ordinary person doesn't know what this means.

Mr. Martin: That's right.

The Court: Is there anything special you have in mind, counsel?

Mr. Martin: I can think of nothing in particular, Judge. I respectfully disagree with the Court on the issue of contributory negligence, but that issue has been decided by the Court. Other than that I don't think of anything.

The Court: I just don't know that there is any evidence. If you think I am wrong, if you have something in particular to point out that the record sustains, I would be glad to hear it.

I don't remember anything that would sustain a —any testimony upon which an instruction on contributory negligence would apply. [5]

Well, I will have to make a decision, that's all. I think you might spend your time arguing the question of damages because that is the field of disagreement.

Well, you might decide whether you are going to have your man testify in the morning on those figures, and we can clear that up rather rapidly and you can be prepared to make your arguments in the morning.

(Thereupon an adjournment was taken to Wednesday, June 3rd, 1959, at the hour of 10:00 o'clock a.m.) [6]

[Endorsed]: Filed August 17, 1959.

[Title of District Court and Cause.]

CLOSING ARGUMENT OF COUNSEL AND INSTRUCTIONS OF THE COURT

June 3, 1959

Closing Argument For Plaintiff

Mr. Hepperle: May it please the Court, and ladies and gentlemen of the jury: It is now the time for argument of counsel. You have perhaps heard on previous occasions on which you have served that the purpose of argument is to help you in your deliberations. I feel a very strong sense of duty here toward Mr. McQueen. I want to do my dead level best to help you in my argument here.

You perhaps have heard in other cases, particularly important in this one, that it is fortunate that when you people enter the jury box and take your oath, you are not required to leave your common sense behind. I say to you a little common sense simplifies this case considerably. There is really only a single issue here and that is, how much to award this man. There was an admission of negligence when the trial began here. There is no basis for any claim of contributory negligence. On this record the Southern Pacific Company is one hundred percent liable, so that it is just a question of how much to award this man.

Now, on our side you have heard the evidence of the fireman, the conductor, Mr. McQueen, the hospital records, Dr. Norcross. On the defense side I say it is an empty, barren defense. With the whole

railroad to draw from, with the whole Southern Pacific Hospital to draw from, we don't have any defense in this case. [1]

There is mention of headaches back in 1950 when Mr. McQueen was in the hospital for the flu. In his opening statement Mr. Martin speaks of arthritis. You hear Dr. VanHorn yesterday. I say, ladies and gentlemen, there is no defense here.

Now, this being a civil case, the rule is that the plaintiff should prove his case by a preponderance of the evidence, and you have perhaps heard that the rule here in a civil case is different from in a criminal case. In a criminal case the proof must be beyond a reasonable doubt and to a moral certainty. In this case, a civil case, it is a matter of the preponderance of the evidence.

This is many times illustrated by the old-fashioned Bean scale where you put the evidence in favor of a proposition on one side, the evidence against it on the other, and whichever way the scale tilts, if it tilts in favor of the evidence supporting the proposition, why, the preponderance has been met. It is a matter of which of the two is the more convincing.

Now, I say on that, way beyond the matter of preponderance you have conclusive proof here of everything important in this case. This accident was a tragedy to this man. It ruined him. It leaves him now with a future to look forward to of a clouded hopelessness.

What kind of a man do we have here? He is a good man. He worked regularly. He was pro-

moted to conductor. He was making better than $7,000 a year. He is an innocent victim [2] here of a disaster. He is disabled. His life is made miserable.

Now, as we mentioned in the beginning of the case, this case comes under the Federal Employers' Liability Act. And on the evidence as it is here, it is plain, simple, clear and conclusive. The purpose of this federal law is to compensate these injured men for injuries negligently inflicted upon them by the railroad or by the other employees of the railroad for which the railroad is responsible.

Money itself can never be an adequate compensation for injuries such as these. Money itself can never take the place of health and happiness. It is the only system that our courts have been able to devise in this country, but at best it's only an attempt to compensate the man.

This man has sustained a terrible loss. He is not the same man and never will be.

Now, the railroad is liable for its negligence. That's the first point. They admit their negligence, so we are over that part with the admission.

The second thing is that if the railroad's negligence in whole or in part caused this man's accident, injury and disability, if the railroad's negligence even in the slightest contributed to it, he has made his case.

One further thing: Mr. McQueen, under this federal law, shall not be held to have assumed the risks of his employment [3] in any case where his injury resulted in whole or in part from the negli-

gence of the Southern Pacific Company or its other employees.

So, with those principles, we have absolute 100% liability here. But for this admitted negligent handling of the signal causing this violent train stop, there wouldn't have been any accident, there would have been no injury.

Now, following the accident and injury, following the period of time that he was both an outpatient and an in-patient at Southern Pacific Hospital, Mr. McQueen found himself discharged without a return-to-duty, condemned by a diagnosis on the record of degenerative disease of the spinal cord and another diagnosis of syphilis. The evidence now proves conclusively that both of those diagnoses were wrong.

There is an attempt to suggest that Mr. McQueen is a fake or a phony or was exaggerating. Use your common sense, ladies and gentlemen. Look at the whole picture here. A faker or exaggerator, he doesn't, with his lawsuit coming up soon, first have a myelogram; second, have a dangerous, expensive operation; next, admit improvement as the result of the operation; and next, spend lots of money in an attempt to get better, to help out the defendant Southern Pacific Company which had already washed its hands of him.

This man has shown good faith at all times. There can be no real basis for any claim of exaggeration on his part. [4] He had this myelogram. It showed this condition. He could have stopped there, could have come into court here and shown you the myelo-

gram films, have a doctor tell you about what they showed with respect to spinal cord compression, and how he was in a situation where a jolt or jar, a further whiplash, could leave him paralyzed for life. He could have complained about the hazards of operation, but it would have been cruel to have this man go any further without attempting to relieve his condition.

On top of that, the findings on the operation itself prove the diagnosis, prove—that is, the true diagnosis—prove the injury and cause of the disability and, in addition, prove conclusively that this is not a disease; this is not a degenerative condition. This was a ruptured disk which caused pressure on this man's spinal cord and which has caused him to be disabled ever since the happening of the accident.

Instead of having the battle of radiologists or expert witnesses over their interpretations of the X-rays alone, this man went ahead with his operation. Dr. Norcross, who saw the condition, who performed the surgery that he told you about, was able to give you the exact condition, the exact cause of the disability; and you will recall Dr. Norcross explained to you how this accident was the cause of Mr. McQueen's pain, difficulty and disability.

Now, there is a suggestion that a man is all through at [5] age 65, but the record here stands undisputed and undenied, ladies and gentlemen, that there is no compulsory retirement age for conductors or brakemen on the Southern Pacific.

Perhaps you have heard of one of the law schools here in San Francisco, part of the University of

California, Hasting Law School, and their 65 Club. Perhaps you have heard how professors are arbitrarily, in other places, forced to take their retirement at a certain age and how Hastings has taken advantage of that and how, by hiring those men who were still able and distinguished, has assembled one of the best faculties in the country. Indeed, there was a joke that one professor applied at age 64 and they told him he was too young. He has yet to come back next year.

Now, I hope that no one tells me that I am all through at age 65, or that I have to do this or that I have to do that. So far as Mr. McQueen is concerned, it is his choice. And it is a matter of more than just the financial ability to retire; it is the choice of the individual as to what he wants to do. How many people have you seen who did retire or were forced to retire and then found themselves bored, listless, missing the occupation which they had enjoyed? It is up to Mr. McQueen. It was up to him. It is no defense to this company to say that he was along in years and, therefore, they didn't owe him anything.

Now, again in the opening statement of Mr. Martin's [6] yesterday he said the cause of the trouble here was arthritis. Ladies and gentlemen, not even the Southern Pacific Hospital record claimed that. They said "syphilis," they said "degenerative spinal cord disease," but they didn't say that arthritis was the cause of this disability.

Bear in mind that Mr. McQueen didn't have any trouble or difficulty until this accident took place.

At the very least, he had no difficulty for a period of seven years, even though, as I say, in 1950 his admission to the hospital was really for flu. He hadn't been near the hospital in that seven-year period.

Now, you have two doctors who appeared in person here—Dr. Norcross and Dr. VanHorn. There is too much variance between their testimony to be able to fit it together and match it. They are diametrically opposed on so many points. Again, it is a matter for you folks to use your common sense on under the instructions which His Honor gives to you. It is part of your function to size up the witnesses, to find the facts, to find the truth. And with respect to witnesses, we have certain things to consider. Sometimes it is a matter of the witness' demeanor, sometimes it is a matter of whether a man contradicted himself or not, sometimes it is a question of, are his statements reasonable or unreasonable in the light of the other evidence in the case. And sometimes we find a situation where Dr. VanHorn kept talking about other people [7] who were hysterical and had such and such results. Well, was Mr. McQueen in that category? Oh, no, no. But then he talked about other people who were functional, sometimes with insurance something happens. But there was never anything to put Mr. McQueen in that category either.

And then on simple questions we found answers that—well, by way of illustration, if you ask a man if he robbed a bank and he is innocent, he will say, "Why, no." But if you ask another man and he

goes into a long, involved alibi with contradictions in it, then you think, well, you had better check up on that.

So altogether, it is a matter of sizing up the testimony of the witness with all the evidence in the case.

Now, a further point. The violence of this accident is again undisputed and undenied. There was a suggestion both by counsel in his opening statement and by Dr. VanHorn as though there were a pre-existing condition here, but have in mind Mr. McQueen was not disabled for at least this period of seven years before this accident.

And we have this principle, that the existence of a pre-existing physical condition which may have made a person more susceptible to the type of injury which resulted from the negligence, or which aggravated it, does not stand in the way of a full recovery against the defendant. So that even if the pre-existing physical condition of Mr. McQueen's spine [8] may have made him more susceptible to injury, and the accident he suffered might not have injured the spine of a normal man, well, then his pre-existing physical condition aggravated the result of the accident, but the Southern Pacific Company is nevertheless liable for the full amount of the damages sustained by Mr. McQueen.

In other words, it is a matter of the accident causing the disability, the pain, the distress.

This is Mr. McQueen's only day in court. Your verdict is going to be it. There is no other award or compensation for him, there is no tomorrow,

next week or next year. The law intends that your verdict here be full and final redress.

We think that in this two-year period the Southern Pacific Company should have taken care of this man long ago. But it is a situation that is going to be left for you to decide.

I want to emphasize that we make no appeal to prejudice here. We do not ask for a verdict based on sympathy or for anything improper. We do ask that you award Mr. McQueen all that he is entitled to under the law, and we do not hesitate to ask you for your humane, common-sense evaluation of this case.

Now, your verdict must compensate Mr. McQueen for the past, present and future. As I say, there is nothing for him beyond your award and your verdict in this case. [9]

Now, on the subject of damages we have certain elements. I have listed them on the blackboard here ahead of time so as to save courtroom time. But before we get to the elements, we have first the matter to consider of life expectancy. As you can see, at age 63 he had a life expectancy of 15.62 years, which would take him to 78-plus years. At age 65 he had a life expectancy of 14.40 years, which would take him to age 79. It is odd that at age 65 he had a life expectancy which would carry him a year longer than he had at age 63, but that is from the table, a conservative table from the year 1937.

Now, on the matter of damages we have, first, the element of wages lost to the present time, and I

have filled that figure in there, "$15,399." Then on this matter of future loss of earning power, it is sometimes said, "Well, a man doesn't work until the last day of his life." And to be very conservative about it, take it to age 70, a period of five years. That amounts to something over $38,000.

We then have the matter of pain and distress, and that is of two types: physical and mental. And that is both for the past and for the future for each of the items of physical pain and discomfort and mental pain and discomfort.

Then we have the further item of medical expense. We have the bills in evidence here and they add up to $2,872.79.

Now, pain and distress is something that we can't weigh like sugar or flour, we can't measure like a suit of clothes. [10] It is a matter for you to evaluate in your own sound discretion. It is a proper element of damages, and it is your duty, under His Honor's instructions, to make an award for those items. It is difficult to translate pain and distress into any fixed sum. No witness can come in and give you an evaluation on it or an opinion. We have a situation where Mr. McQueen has been through an awful lot to the present time. Is $10.00 a day too much for the physical pain he has been through up to the present time? That comes out to $3,600 a year.

Is the same too much for the matter of mental pain up to the present time, or mental distress? Again it is the same rate.

For the future, taking into account that he is

improved but still disabled, still under the pain medicine, is $3.00 a day too much for that. That adds up to $1,000 a year.

So that when you take all these items into consideration, we reach some very substantial figures.

Now, on this matter of mental pain, that is something, a mental something, which has various forms and phases, depending upon the individual's temperament, the kind of injury he sustained, whether it is permanent or temporary; and mental worry, distress, mortification, are proper component elements of damage.

Now, I told you in our opening statement that we had prayed in the complaint for damages in the sum of $200,000. I [11] am sure His Honor will instruct you that the prayer in the complaint is only an allegation. It is not evidence, but is part of the papers that were filed. But your award should be based upon the evidence and the facts as you find them and as you apply His Honor's instructions to them.

When this man first came to our office, you will recall that up until the operation he was in this situation where he walked with this wide-based gait; and where in the hospital records they referred to him as a manikin, I referred to him as a zombie. He had the terrible sense of pressure in the back of his head and neck. I thought he had a severe brain injury at the time. Now that we have got the full picture so that we know exactly what it is, this injury to his spinal cord is almost as bad.

So it is up to you, you 12 people from different walks of life, using your unbiased, composite judgment here, to reach a verdict. All we want you to do is consider the evidence here, consider this case on the facts, each one of you taking his or her part in the deliberations, each one of you being represented in this verdict—a verdict that will pay this man only his actual monetary, dollars-and-cents loss for each element of damage under His Honor's instructions.

Now, I say to you sincerely that I personally think that we should have a verdict in this case of not less than $50,000. So often we hear that jurors have wondered at the [12] failure of the attorney to explain his views as to how much should be awarded, and they say, "He talks about everything else," and in this case that is the only issue for you to decide. So, as I say, I sincerely feel that your verdict should not be less than $50,000. You can see that with just his wage loss and medical expense to date, and five years' more earnings, that even that sum is exceeded. So in addition, he is entitled to compensation for his past, present and future pain and suffering and, in my opinion, those items in addition—for those items in addition, another $50,000 could be awarded.

But, once again, I am expressing my views so that you may hear what I have to say, so that counsel may have a chance to reply. In the final analysis it is not what I say or counsel says or anybody else says; it is up to you, under His Honor's instructions, to exercise your collective judgment here to see that this man is fully compensated.

I will close now. I will have an opportunity to speak briefly when Mr. Martin is through.

Mr. Martin: Your Honor please, it is close to recess time. I think it might expedite matters if I were to go through my notes.

The Court: Well, I want to instruct the jury this morning. All right, we will take a brief recess.

(Short recess.) [13]

Closing Argument For Defendant

Mr. Martin: Your Honor, counsel and members of the jury: It is now my opportunity to discuss with you briefly the evidence in this case and the facts as I view them from the other side of the counsel table and on behalf of my client, Southern Pacific Company.

First I wish to thank you for the attention you have paid to this case. The testimony has been brief and I don't think I have to dwell on it at any great length because you are just as intelligent as I am and you heard it just as I did. It hasn't taken long and there is no use rehashing it at length.

I want to, first of all, sort of apologize to you and His Honor and counsel in that I may have had difficulty making myself understood, because I have a head cold which it is rather hard to negotiate under, but I will do the best I can.

This is my only chance to talk to you because the way these cases work is that plaintiff makes the opening argument, which you just heard, and then the defendant is given a chance to discuss the case with you, and then, finally, Mr. Hepperle will close

in his reply argument, which is designed to be directed to any new material which I have brought up in my argument.

As you know from what has gone before, we are dealing here with a law known as the Federal Employers' Liability Act, [14] which relates to the rights of employees of common carriers by rail, or railroads, to bring suit and recover damages against their employers for injuries connected with their employment. This may seem to some of you who are familiar with the California system to be a rather, let us say, formal way or archaic way of settling things, rather than by the commission system and the compensation law that we have in the state and many other states.

However, this law has been on the books for a long time, since 1908, and whether we like it or not, it is the law, and we will have to take our instructions as to the law from His Honor and I am sure he will instruct you fully in all the provisions of this law which have application here.

Now, I know as I stand here that my part in this case and the client whom I represent is not the most sympathetic part of these cases. I represent a railroad and I represent a corporation, and this is a suit by an employee for injuries sustained on the job against my client. Now, it may be that during the course of this trial I may have said something or done something that may have offended you. I assure you, if I have, it was inadvertent, it wasn't intended to do that. But if by any chance it has,

I sincerely hope you will take it out on me and not on my client.

We are here, I am sure His Honor will tell you, to dispense justice under the law and any feeling you may have [15] against or on behalf of one of the parties shouldn't influence your judgment. We are here to view this case dispassionately and decide it under the evidence and under the law and nothing else.

I am sure you are all aware of the fact that unless every person in a courtroom is given the same consideration, our system of justice is meaningless, regardless of whom that person may be, and on my behalf and for my client I am asking you not to give us any more than we are entitled to, but, on the other hand, don't give us any less. In other words, what we want here and what we are entitled to is an even break, and to have this case decided on the evidence and on the law. I don't know whether any of you have had experience with them before or not—usually there is a dispute in these cases as to who is at fault, because this federal act takes that into consideration just as responsibility is involved in the law, but it is not here in this case. In this particular case, as has been indicated to you by the Court, by counsel and at the beginning of this case we have admitted that this student tower man on the signal mistakenly threw a switch which caused a signal light to go red in the face of an engineer in the yard. This light the engineer was bound to obey by stopping that train as fast as he could, and his testimony is that he made an emer-

gency application of the brakes, as he was required to do, on a train traveling at 6 to 8 miles per hour, which [16] brought it to a sudden stop.

Now, under the way this case has developed and under the law, as His Honor, Judge Goodman, will tell you, the only issue for you to decide in this case is the reasonable compensation to which Mr. McQueen is entitled under the law. I want to make that point clear from the beginning. It has been the position of the defendant here that we are at fault, no question about that.

Now, what happened here, and to follow this matter through, is that Mr. McQueen was seated at a desk which the pictures here of the caboose will show. When this stop occurred, he was thrown against a partition and the picture there will show you what it was. He, as I remember the testimony, hurt his right arm, hit the right side of his head and broke his false teeth in the occurrence. Then they went down to the yard where reports were made out by the conductor and finally Mr. McQueen was taken to the General Hospital in San Francisco. There he was looked at and an X-ray taken, and he was sent back—he remained in San Francisco and went home the next day and reported back to the hospital a day or two later.

The records will show that he was treated as an out-patient at the General Hospital for several months; that is to say, not a bed patient, but he would go to the hospital, be examined and checked upon and return home, not remaining [17] as a bed patient in the hospital.

Finally, toward the end of 1957, I believe it was in October, from October through about April, I believe, of 1958, he was admitted to the hospital on various occasions where he would remain for a week or two at a time, given various tests, etc., and finally, after having been examined by a host of consultants, was discharged from the hospital with a diagnosis of posterior cord disease of unknown etiology, which has been explained to you as meaning "causation unknown," and also an indication in the record of suspicion of lues or spyhilis.

I have made no point of that in this trial and I make no point of it now. That syphilis statement on the record, as far as I am concerned, has no bearing on the case and wasn't brought up by me, and I had no intention of bringing it up. It has been brought up by Mr. Hepperle, for what reason I don't know. None of the doctors here have testified that that had anything to do with it, and certainly I would be the last one to make any such statement here.

The thing I want to get over to you is, as far as the initial aspects of this case were concerned, is to bear in mind that this was not a case of a man having a definite, frank compression of the spinal cord. The hospital doctors, and there were many of them, as can be observed from these records, did not make such diagnosis. And the next doctor outside of the hospital department doctors to see Mr. McQueen was [18] Dr. Norcross who saw him in December of 1957, some seven or eight months after the accident.

Dr. Norcross—and you will recall the testimony—his diagnosis at the time he first saw him was of a neck whiplash or strain, and his other diagnosis was a degenerative disorder of the nervous system. Those were his diagnoses when he first saw Mr. McQueen.

Then later on we had Mr. McQueen examined by Dr. VanHorn, as we are entitled to do, and Dr. VanHorn made substantially the same diagnosis—degenerative disorder of the nervous system—and he gave his reasons why he arrived at that diagnosis, and he told you on cross-examination by Mr. Hepperle that where you have a severe compression of the spinal cord there are findings which you have which are objective findings. That is, there is no question about them; they are there. You have muscle atrophy or wasting away of muscle. You have a loss of muscle power. You have a disturbance of sensation. Those types of things which are quite commonly associated with the compression of the cord.

This Mr. McQueen did not have. Nor did Dr. Norcross believe he had at the time he first saw him. It wasn't until over a year later, in fact a year and three months later, that Dr. Norcross had Mr. McQueen entered at the Peralta Hospital in Oakland where they did a myelogram and found these indentations. [19]

Dr. Van Horn explained to you what that thing is. They have this fluid which is lying in a sort of a tunnel; you are looking down on top of it, and these ridges that appear on the bony part of the

canal of the spine show up as indentations in this puddle of material which can be looked at through X-rays.

This condition was observed on the myelogram and Dr. Norcross then performed an operation at the largest of these ridges, which is between two vertebrae and the neck, and did not remove the ridge which he found there, but simply freed the cord by cutting a couple of ligaments which permitted it to ride freely over that ridge.

So I think that anyone who is casting aspersions at the diagnosis of Dr. Van Horn and the Hospital Department at the beginning of this case, considering Dr. Norcross' own diagnosis, is hardly in a good position to question those early diagnoses.

Now, the things that impressed me—one of the things that was said by Mr. Hepperle in his argument I thought, let's say, was not fair. He stated, in effect, that Dr. VanHorn called Mr. McQueen a fake. Well, now, I heard the testimony and I thought you did, too, and I thought that Dr. Van Horn was quite clear in saying that he did not believe that Mr. McQueen was malingering or was a faker. Dr. Van Horn merely said that with Mr. McQueen's absence of these objective findings that he mentioned to you and with his pronounced symptoms in the absence of the findings, he thought there was what is [20] known as a functional overlay on the case; that is to say, the man is unconsciously exaggerating his condition, due to nervousness, tension and that type of thing. Now, that is a long way from saying a man is a faker.

I want you to bear that in mind because in lots of these cases the appeal to you is not to decide them emotionally, but items are injected into argument which subtly have that effect. I want you to be careful, in deciding this case, to make sure that no emotional appeal, either obvious or subtle, influences your judgment in this case.

Now, the record will show—and both Dr. Norcross and Dr. Van Horn have testified—that Mr. McQueen, pre-existing this accident, and a long time pre-existing this accident, had arthritis in his spine—in his neck. Dr. Norcross admitted that it was severe, and Dr. Van Horn told you that the X-rays shown at the Peralta Hospital showed that it was so far advanced, in fact, that some of the vertebrae in his neck have actually grown together causing these bony spurs to project out.

And Dr. Norcross told you—he didn't tell you this accident caused the condition in this man's neck for which he operated. The most that Dr. Norcross said was that the accident aggravated that condition which had been there for a long time. And Dr. Norcross went even further. Dr. Norcross said that this condition which he found, this ridge along the [21] back of the spinal canal, the front of it—this ridge is something that is caused by arthritis and, as a matter of fact, can cause symptoms without injury at all—which I think is quite significant in this case.

We do know that Mr. McQueen had had neck symptoms and headache associated with it prior to this time. In 1950, the record will show, he had

those symptoms and that he was given traction for it. That is, they stretched his neck for it. Now, I don't think that is related to influenza. That is in the record, and Dr. Van Horn told you what that record showed.

Now, I think another thing of some significance was that when Mr. Hepperle was cross-examining Dr. Van Horn, he said, "Well, isn't it a matter of fact that the Peralta Hospital records say that this was a ruptured intervertebral disk"? And Dr. Van Horn said, "Well, that's only an interpretation made by a radiologist who is not an expert in this field. And furthermore, doesn't the entry in that record have a question mark after that statement?" And Mr. Hepperle looked at the record and was forced to confess that there was a question mark there.

So this picture is not the black and white picture that Mr. Hepperle has pointed to. What we have here, and I think it is amply demonstrated, is that following this accident Mr. McQueen had apparently struck his right arm and he had [22] some symptoms in his right arm. He had a strain of his neck from which he had headaches, as he has testified. He had some symptoms in his spine which apparently were of a mild compression of the cord, but of a mild nature or, otherwise, they would have produced the full-blown symptoms, which they didn't, full-blown findings.

These symptoms, as far as the loss of balance was concerned, were related to the cord and they were the type of thing which occur with people with this

developing arthritis in the neck and occurs with advancing age.

Now, this operation which was done by Dr. Norcross—and you heard the testimony—has produced striking subjective relief. That is to say, Mr. McQueen feels an awful lot better following this operation. He has testified his headaches have gone, his balance is okay; he has some neck pain and he has difficulty raising his head high. But bear in mind, and I think it's a matter of common sense, and I don't think any doctor has to tell you this,—bear in mind that we are looking at this case 60 days after an operation on the neck. And certainly Mr. McQueen is entitled to some complaints in his neck 60 days after an operation, and a little over a month since he left the hospital.

Mr. McQueen has told us that he tires. He has a feeling of fatigue. Dr. Norcross told us that he is suffering from a mild anemia and that this anemia is under control and, as [23] far as the testimony went, this anemia will be taken care of and that accounts for the tiredness which he feels.

The operation report failed to show any evidence of any damage to the cord itself. So we have Mr. McQueen at the present time with some neck pain, which I say is to be expected; with some limitation of motion in the neck, and certainly in a convalescent stage following a neck operation he is entitled to some over and beyond the limitation in the neck which he would have normally because of the advanced arthritis he has in his neck.

Now, substantially, that is the present picture.

I think it is a little unfortunate that you people are having to decide this case so soon after the surgery. I think it would have been much better to have had the trial six months after surgery, but I think the evidence is clear from all, including Dr. Norcross, that Mr. McQueen is improving, has improved, and will continue to improve.

Now I am going to proceed quite quickly because I am taking up too much time, I know, and his Honor wants to instruct.

With reference to the claim of damage here, it is true that there is no restriction on the part of the railroad to the age at which men work, brakemen and conductors. But I don't think it follows from that that everyone works until age 70. And I think it also follows that the life expectancy [24] tables are no criterion as to how long a man will work, because it is common knowledge that people don't work until they drop dead.

Now, we are not dealing with a statistic, a life expectancy table, something out of the air. We are dealing with a specific individual, Mr. McQueen. What do we know about Mr. McQueen as far as his work expectancy is concerned? We know that Mr. McQueen has advancing arthritis in his neck, and has had it for a long time and it is most severe right now. We know that Mr. McQueen has marked arteriosclerosis as is developed by his chest X-rays. That is hardening of the arteries. We know that Mr. McQueen has had difficulty with his neck before this.

Now the question is, we award him the damages

asked here to date, which are $15,000 and something, for wages lost to date. We do that upon the assumption that Mr. McQueen would have worked steadily for two years, to the present time, without showing any of this condition which he has had and has long had, without any of that affecting him in any way. Now, I think that is giving Mr. McQueen not the worst of it by a darned sight.

Then we are asked to blithely assume that he will work five years more, until age 70. I say in the face of the facts in this case and what we know about Mr. McQueen, the specific person we are dealing with here, that is asking you [25] as jurors to assume a good deal in Mr. McQueen's favor, and I don't think it's the fact.

Now, as far as the operation is concerned, this condition, this ridge which he had, was not put there by this accident. It was a pre-existing condition and everybody has said so. The operation has relieved that condition. It no longer is a source of difficulty. How much the actual accident mixed that up is a matter of conjecture, but it was there a long time before the accident. The operation cleared a condition, or the operation corrected a condition which long pre-existed the happening of this accident.

Now, by giving Mr. McQueen the total cost of that operation, we are not giving him any of the worst of it, I submit, under the evidence.

Then we have one other matter, and that is, the testimony of Mr. McQueen in this case is that he intended to continue working. Well, at that time he

was age 63 and I suppose when he did think about it that would be the normal assumption. People, unless they are forced to retire at a given age, don't ordinarily make specific plans to retire at a specific time. But I think under the circumstances of this case, as he approached 65, when he would be entitled to his maximum pension, Mr. McQueen would have given considerable thought, in view of his physical condition, about retirement at age 65.

Now, there is one further thing and that is this: For [26] you to consider in connection with how long Mr. McQueen would have worked. He is entitled to the maximum pension right now and has been since he reached age 65 in May.

Mr. Hepperle: I think that is improper, your Honor.

Mr. Martin: Now, your Honor, I am not speaking of the question of mitigation of damages at all. I am going into the motivation for Mr. McQueen retiring.

The Court: Proceed.

Mr. Martin: Mr. McQueen is entitled to his maximum pension at the present time and he has not applied for it. Now, we know that Mr. McQueen is getting better. We know he is not out of the convalescent stage of his operation. We know that as a conductor most of his work is riding in the caboose and doing paper work and supervising other employees.

Now, if Mr. McQueen feels that he wants to go back to work as a conductor in the future, I think

that is a decision for him to make. And I think that that decision, based upon his actions in the past, is probably going to be that he wants to go back to work as a conductor. And I think under the evidence in this case that the chances that he will go back to work as a conductor, for which he is qualified to work by his seniority, are quite excellent. But that is his decision. Whether he would have made that decision at age 65 to retire or not we don't know, except that we know he had the physical findings which would cause a man to give a lot of thought to [27] working beyond the age at which he could retire.

Now, under all the evidence in this case, having heard it all, considering the operation which cured a condition which we did not create, giving him the benefit of two years' work to age 65, I think a verdict in the neighborhood—and I am not trying to pinpoint it or tell you what to do because, of course, you are the people who decide these cases—but a verdict in the neighborhood of $20,000 would be a reasonable verdict in a case of this kind.

Now, there are a lot of things here that I haven't discussed, that I have omitted, that I have probably forgotten to do, and Mr. Hepperle will get up and probably mention a lot of things that I could dwell upon, were I to talk to you again, but we are all human and I forget to touch on things that you might consider important. But I have done the best I can. Bear in mind that when I sit down at this counsel table to hear Mr. Hepperle's closing argument, there is nothing I can say, and it is quite a

difficult job to sit there and hear someone say something you could respond to.

I want to thank you again. I want to ask you to listen carefully to the instructions and decide this case without passion or prejudice, and to balance the scales evenly and give both sides the same break that you would like to have.

Final Argument For the Plaintiff

Mr. Hepperle: May it please the Court and ladies [28] and gentlemen of the jury: I am going to try to be brief myself. I say to you, first, if this were only a $20,000 case, we wouldn't be here. If it were, the Southern Pacific Company would have some real evidence to present to you instead of a mere argument.

I say to you this defendant knows what this case is worth. They have a right to argue to the end. On the merits I think it is perfectly obvious they should have taken care of this man long ago.

Now, we had some summary of testimony. Fortunately, I have an official transcript prepared by our official court reporters. A few points first in relation to Dr. Norcross.

As to the myelogram, the reason for it, he said, "I felt we could not make a definite diagnosis in this particular individual, and I further felt that further diagnostic studies were called for. I was not happy with the information we had. I thought we should acquire more information in other ways. In other words, that was the reason for the myelogram, and when the myelogram was performed,

that, again, was the reason for the surgery and the surgery demonstrated the exact condition here."

And then counsel tells you in his argument, ladies and gentlemen, that there was no compression of the cord here. Dr. Norcross' testimony is that, "We entered the spinal canal. We opened the dura. This is a tough membrane that surrounds [29] the spinal cord. And then by tilting the cord slightly to one side, we were able to show a very decided mass that was coming backward against the cord from the area of the vertebral body in front. It was compressing the roots slightly and the cord even more so."

Counsel also tells you that there is no basis for the matter of the herniation of the disk. Peralta Hospital record:

"Final diagnosis: Herniation I.V.," for intervertebral disk. "Wound infected. Operation: laminectomy."

And when the operation had fully exposed all the structure so that Dr. Norcross could see it, we had this testimony:

"Following the operation, Doctor, were you able to make a definite diagnosis as to the cause of Mr. McQueen's difficulty?

"A. Yes. Mr. McQueen had suffered a compressive disorder of the spinal cord."

And then as to the cause of the disability:

"I believe his disability was brought about by the accident of May 29, 1957, which by trauma to his neck and shoulders brought about an aggravation of

a condition that we are quite sure had been present before, but which had been symptomless and which was giving him no difficulty. This injury, then, aggravated, upset and disturbed the state of affairs until it brought about the disability and changes that we found which [30] were in part, at least, helped considerably by the surgical procedure that in part corrected the state of affairs that was found within his spinal canal."

Again, "State whether or not, Doctor, the improvement noted by the patient substantiated your diagnosis of herniated intervertebral disc?

"A. It substantiated my diagnosis of compression of the spinal cord and disordered function of the spinal cord due to herniated intervertebral disc."

And as to return to duty:

"Q. Now, Doctor, do you have an opinion as to whether Mr. McQueen is disabled for his job as a railroad man?

"A. Yes, I think he is disabled for his job as a railroad man. At the present time his greatest disability is pain and discomfort in his neck. The neck can be extremely painful and disabling. The condition of his lower extremities is improved to the point where I think he can walk around ordinarily without much difficulty.

"He finds, though, and this is consistent with our findings and his course, that if he tried to start jumping around or hopping or had to do anything that he might have to do in an active life on the

railroad, he would have difficulty with his leg still. I would question that at his age this is probably ever going to improve to the point where he will be able to get on and [31] off trains and do the things that he would have to do as a conductor on the railroad."

And again Dr. Norcross states at page 82:

"I think his disability resulted from that accident, that is, the one of May 29, 1957."

And then as to the spinal cord itself, he says:

"I think without any question some of the fibers have been killed. Fibers within the brain or within the spinal cord never grow out again because they are dead, and we are left here with a definite deficiency in certain types of fibers in his spinal cord, I think probably those having to do with the agile use of his legs. It is a matter of rapidity or difficult use, and I feel he is going to continue to improve even from what he is now, but some of these fibers have been killed and will not regenerate. They cannot. And I question very much if he will ever be able to be as agile on his legs as he was, or, indeed, to be sufficiently so to carry out his occupation."

And then you will recall the matter of this infection that set in afterwards, and the doctor said,

"Following surgery he developed a superficial infection of his wound. It did not go in deeply, but it was rather resistant to treatment and healed slowly. We had to open it once and then reclose it. This created [32] a lot of scarring in the tissue underneath the skin on the back of the neck, and scarring on the back of the neck is likely to bring about a

rather miserable, long-lasting, chronic, painful neck that is not pleasant at all."

Now, it is true that when Dr. Van Horn was pressed on cross examination he finally said, "Well, I wouldn't say that Mr. McQueen was consciously or deliberately faking," but up to that time, at three different points, he had mentioned this point about exaggeration.

Now, we asked him about the diagram on the board from the book by Dr. Sterling about the cervical intervertebral disc, and he tried to dodge that. He was saying there was exaggeration because he didn't find certain objective findings that would have been caused if there had been cord compression. But then when we follow it further, the description of the diagram itself, the whole purpose for the diagram, "The greatest strain is anterior on track in which disturbance would not be demonstrable by clinical tests."

Regardless of whether he says it is conscious or unconscious, the point is there was this compression, there was this ruptured disc, there was this difficulty about it, and this man is through as a railroad man.

Now, there were so many contradictions in Dr. Van Horn's testimony that it would take a long time if I were to pick them all out of the transcript. You heard his testimony [33] yesterday afternoon. Unfortunately, at times when he was making such long answers it was difficult for you to hear. Even our fine court reporter was unable to catch some of it. However, among other things, Dr. Van Horn

never did notice the fasciculations or twitchings either in the muscles, at the base of the thumb in the hand or in the legs, either on his first examination nor on his second examination. In that connection we find that——

The Court: Mr. Hepperle, I think you should limit yourself. You have already spoken 40 minutes and your opponent spoke only 25 minutes. I see from the type of your remarks that you could go on quite a long time. I don't think that is fair.

Mr. Hepperle: I will close very quickly, your Honor.

The Court: I think you should limit your remarks.

Mr. Hepperle: Thank you, your Honor.

I will close, ladies and gentlemen. I repeat, there are many, many contradictions in Dr. Van Horn's testimony. When you compare it to the facts in the case, to the testimony of Dr. Norcross and the findings, it doesn't stand up.

So I say, "Look at the whole picture here." Dr. Norcross did his best for this man. He saved his life. He saved him from further compression which might have led to paralysis. But this man is through. He is not a statistic; he is a [34] human being. He had the right to live out his life without this injury. We ask that you award him fair and proper damages here. His whole future is in your hands. He will live the rest of his life with your verdict. Thank you.

Instructions of the Court

The Court: Members of the jury, inasmuch as some of you have had no prior experience as jurors, I just will give you brief bits of advice about your part in this case.

You are the sole judges of the facts in a case of this kind and no one else has a right to interfere with your province of deciding the facts. In this case the facts which you will decide will be somewhat limited because they will be limited to the question of the amount of damages. The Judge will give you some advice as to the law and you will have to accept his statement as to the law. You have to assume, rightly or wrongly, that the Judge knows what he is talking about when he tells you what the law is and be guided accordingly.

I say that to you because it does sometimes happen that a person comes into the jury box with some preconceived notions about political or economic or legal theories, and they will proceed to say what they think the law should be and then decide the case that way. Well, that is wrong. We don't permit it because, if that were the case, no man's life or [35] liberty or property would be safe. Hence, we require the jurors to make their decision within the limitations which the law prescribes, as the judge explains to them what the law is.

So while we have somewhat different functions to perform, you decide the questions of fact and I tell you what the law is, we are, nevertheless, in a sense a sort of a team because we both have the same

objective and that is to try to do justice between the parties before the Court as best we can.

Now, you shouldn't let your decision in this case in any way be influenced by any sympathy or prejudice. It is a cold-blooded proposition, as it were. You decide the case on the basis of the evidence that you have and no other considerations should enter into your decision.

This is a civil case, and in a civil case the plaintiff has the burden of proving his claim by a preponderance of the evidence. That means that the evidence produced on his behalf has more convincing weight—if the evidence produced on his behalf has more convincing weight and effect than the evidence against it, then he has sustained the burden of proof. We are not particularly concerned with this doctrine in this case because the evidence has been very limited and, in fact, aside from the medical phases of it, is not very much in dispute. Of course as to the medical phases of it, there is some dispute and you have to apply the doctrine of the preponderance of [36] evidence and decide whether or not the evidence produced on behalf of the plaintiff has more convincing weight, in effect, than the evidence produced the other way.

In deciding that, you have to weigh the testimony of the witnesses who have testified here, and you determine that by considering the manner in which the witnesses testified, the demeanor of the witness, whether he contradicts himself, whether he is contradicted by the testimony of some other witness, what, if any, interest he has in the case, whether for

the plaintiff or for the defendant, and upon the basis of all those factors you determine how much weight to give to the testimony of a particular witness, and it is your exclusive province to determine how much weight you wish to give to the testimony of any witness.

This is a Federal Employers' Liability case, as has been told to you. It is a suit brought under a federal law that allows the employee to bring an action in court to recover damages for any injury that he may have sustained as the result of the negligence of the railroad company. The railroad company, being a corporation, only acts through its employees and representatives, and so the negligence, if any, of an employee acting within the scope of his employment is the negligence of the railroad company.

The employee does not under this law assume any of the risks of employment. He cannot be deprived of a recovery in a [37] case if it appears there has been negligence on the part of the railroad company or its employees by any idea that he has assumed any risks of employment.

In this case the evidence was not disputed and it has not been contended otherwise than that this accident happened because of the negligence of an employee of the railroad company, and, consequently, you may start off in your consideration of this case on the basis that the negligence is not in dispute here, and that the plaintiff came to whatever injury he suffered as the result of the negligence of the railroad company.

That will leave your sole problem in this case the question of determining the amount of damages that the plaintiff suffered as the result of this accident. You should not award any damages to the plaintiff for anything else except for the damages that directly and proximately were caused by the accident that occurred.

You may take into account, in connection with determining the amount of damages, the nature and extent of the injury which was caused to him by the accident, whether it is permanent in character or temporary in its nature.

You may take into account the pain and suffering that he may have suffered, both mental and physical, as the result of the injury and also what is reasonably likely to occur in the future as the result of the accident. [38]

You may take into account the loss of earnings to the present time, and also any loss of earning capacity that he may suffer in the future, depending upon the extent of his disability, the extent of it and the nature of the disability. In considering any loss of future earnings that you may find he may have suffered, depending upon the extent and permanency of the disability which you may find to have been incurred by him, you should not award the total amount of any future earnings that he may have lost, but only the present value of them. There has not been any testimony offered in this case or presented to you with respect to the manner in which you can calculate the present value. I think it would be sufficient for me to say to you, and a fair state-

ment, that not the full amount of the loss of future earnings is recoverable, but only the present value of them; that is, how much, using some reasonable rate of interest at which money can be safely invested, what amount presently invested at a reasonable interest rate would produce that sum of money that has been lost over the period of years that you think may be or that you determine may be the extent of his disability, if you find that he will be disabled for any substantial period in the future.

The lawyers have indicated to you what they consider to be the proper amounts of damages in this case. They have a right to do that. In fact, I would say it is their duty to [39] give you that sort of help in this case. However, you are not bound by the statements of the lawyers either way, by either of them, as to the amount of damages that should be awarded in this case. You form your own judgment on the basis of the evidence that you have before you.

You should not award any damages in this case for any condition of health or illness or disability that the plaintiff may have had at the time of this accident. You cannot award him damages for the condition that has been referred to as arthritis. That is something that he had and that was not caused by this accident. You can, however, consider and take into account in estimating the extent of his injury the extent to which that condition was lighted up or exacerbated, as the doctors say, by the accident that occurred on the day that has been referred to here, and the damages that he is entitled

to are to that extent subject to some limitation, that is, that they must be confined to the injury that was caused by the lighting up of this pre-existing condition that he had.

That does not mean that you are not and should not give consideration to allowing full damages, whatever they may be, for the injury that might have been caused by the lighting up of this previous condition of arthritis which admittedly he had.

Now, the damages such as you award in this case should be reasonable. They should be based upon the evidence. They [40] should not be by way of punishment to the defendant in this case because this is not a case in which damages by way of punishment or penalty are awarded. You are not here to divide the wealth of the world in the form of assessing penalties. Your award should be the full measure of whatever the evidence shows the plaintiff is entitled to receive, no more and no less.

Now, I think, members of the jury, that since your activities will be somewhat confined to the issue of damages, that I have given you about all of the advice that I can which will be helpful to you.

I might say that there is one matter which occurs to me that perhaps I overlooked, and that is whether or not the plaintiff is entitled to receive a pension, or whether he has it or has applied for it, or the amount of it is not a consideration that affects the amount of any award for damages.

You should use your common sense in this case. Consider all of the natural propensities and tendencies of human beings which you know about, which

you have learned about in the course of your lives. That is what we mean when we say "common sense" —"use your common sense."

You shouldn't, in arriving at an award in this case, make use of any element or scheme of chance to decide the amount to be awarded. That is sometimes done. Sometimes the jurors, or each juror, writes down on a piece of paper how much he or she thinks the plaintiff is entitled to, and [41] they add it up and divide by 12. Well, that is a very easy way to come to a decision in the case, but if I may say so, without being offensive to you, it is also a very lazy way of performing the duties of a juror and you should not do that.

I don't mean that you should not freely discuss amounts between yourselves and make adjustments in accordance with the discussions which you have, but you shouldn't use any scheme of chance to arrive at your decision.

Now, when you go out to the jury room to deliberate, you select one of your number as foreman or forelady, as the case may be, and he or she will preside over your deliberations, will sign your verdict for you when you have reached it, and will represent you in the further conduct of the case in this court.

In the federal court your verdict must be unanimous. You cannot reach a verdict unless all of you have agreed to it, so you should not return to the courtroom from the jury room with a verdict unless in the jury room all of you have agreed to the verdict.

We have prepared a form of verdict for you. It reads:

"We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of $....."

Whatever amount you agree to should be inserted in that blank space and the foreman signs the verdict and that is your verdict. [42]

If, after you have retired to deliberate and have organized and have elected a foreman, you wish to see any of the exhibits in the case, you may send word through the officer and we will see that they are sent to you.

Does either side have any suggestions or corrections?

Mr. Hepperle: No, your Honor.

Mr. Martin: I have one matter about which your Honor has already ruled and which I wish to note for the record. I don't know whether it is necessary at this time.

The Court: You wish to note an exception on the failure or refusal to give any instruction on contributory negligence?

Mr. Martin: Yes, that is right, your Honor.

The Court: The record will note your exception.

Mr. Martin: Thank you, your Honor.

The Court: Now, ladies and gentlemen of the jury, it has reached the noon hour and I am going to send you out now with the Bailiff. I don't think you will be able to get too far on empty stomachs so, if you wish, and after you have gotten yourselves

organized and elected a foreman, the Bailiff will take you to lunch, and then after lunch you can commence your deliberations.

I don't mean to say that I am in any way prohibiting you from discussing it at any time after you have gone out to the jury room, but I think it will be better if, after you [43] have organized, you go to lunch with the Bailiff and then resume your deliberations after lunch.

(Thereupon, at the hour of 12:00 o'clock noon, the jury retired to deliberate upon their verdict.)

(At the hour of 2:50 p.m. the jury returned to the courtroom and the following proceedings were had:)

The Court: Has the jury arrived at a verdict in this case? Give the verdict to the Deputy Marshal, please.

The Clerk: Ladies and gentlemen of the jury, hearken unto your verdict as it shall stand recorded:

We, the jury, find in favor of the plaintiff and assess damages against the defendant in the sum of $60,000.

Is that the verdict as rendered? The verdict is unanimous, your Honor.

The Court: Do you wish the jury polled?

Mr. Martin: Please, your Honor.

(Thereupon the jury was polled and each juror answered in the affirmative to the Clerk's question, "Is the verdict as rendered your verdict?")

The Clerk: The jury has been polled, your Honor.

The Court: The 12 jurors having answered in the affirmative that the verdict as rendered is their verdict, the Clerk is directed to record the verdict.

Members of the jury, the Court wishes to thank you for [44] your time and attention that you have given to this case, and you will get some notice later on when you have to come again.

(Thereupon the jury left the courtroom.)

The Court: Do you want a stay?

Mr. Martin: Yes, your Honor, can we have a stay of execution for ten days?

The Court: There is no objection to that?

Mr. Hepperle: No. [45]

[Endorsed]: Filed August 25, 1959.

[Endorsed]: No. 16591. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company a Corporation, Appellant, vs. Harry J. McQueen, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: August 26, 1959.

Docketed: August 27, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 16591

SOUTHERN PACIFIC COMPANY, a corporation, Appellant,

vs.

HARRY J. McQUEEN, Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Agreeably to Rule 17, paragraph 6 of the Rules of the above Court, appellant Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely and its designation of all of the record which is material to the consideration of its appeal as follows:

I.

Statement of Points

The points upon which appellant intends to rely are as follows:

1. The refusal of the Court, duly excepted to, to submit to the jury the issue of the contributory negligence of the plaintiff tendered by defendant's answer and endeavored to be tried and presented by defendant and, in this regard, and more particularly:

(a) Court's admonition to the defendant, in the

course of defendant's opening statement, not to assume that the issues of contributory negligence of the plaintiff could be submitted to the jury (p. 117, 1.7 of the Reporter's Transcript of proceedings of June 2, 1959);

(b) The Court's advice to counsel for the defendant that it saw no basis for instructions on contributory negligence and would not instruct on that subject (p. 2, 1. 11 ff of Reporter's Supplemental Transcript of proceedings of June 2, 1959);

(c) The Court's refusal to give Defense Proposed Instructions 6 through 12 (both inclusive); and

(d) The Court's instructions to the jury in which it refused to instruct on the issue of contributory negligence or to submit that issue to the jury and its instruction: "In this case the facts which you will decide will be somewhat limited because they will be limited to the question of damages." (p. 35, lines 12-14 of Reporter's Transcript of proceedings of June 3, 1959) and its instruction to the jury: "That will leave your sole problem in this case the question of determining the amount of damages that the plaintiff suffered as the result of this accident." (p. 38, lines 12-14 of Reporter's Transcript of proceedings of June 3, 1959.)

2. The evidence was sufficient to sustain a jury finding that the plaintiff was guilty of contributory negligence and was sufficient to submit to the jury whether or not he was so guilty of contributory negligence and that the amount of any award should be

reduced in proportion to such negligence as they found, all agreeably to the provisions of the Federal Employers' Liability Act.

3. The Court erred in not receiving into evidence and as bearing upon the issue of contributory negligence of the plaintiff, Operating Rule No. 2061 of defendant- appellant, offered in evidence by defendant and designated as Defendant's Exhibit C for Identification.

4. That accordingly the verdict is excessive and is without any reduction, or consideration of the matter of reduction, by the jury on account of contributory negligence attributable to the plaintiff.

II.

Designation of Record

Appellant hereby designates as all of the record which is material to the consideration of this appeal, and designates for printing the whole of the certified record on appeal (except as hereinafter specified), including exhibits appropriate for reproduction when required to be printed by the Rules of this Court when designated; and as not appropriate for reproduction by printing and as matter not designated for printing, specifies as follows:

(a) Exhibits; except that there shall be printed Plaintiff's Exhibits 3, 3-A and 5 and Defendant's Exhibit C for Identification;

(b) Plaintiff's proposed instructions;

(c) Defendant's proposed instructions except Defendant's proposed instructions 6 through 12 both inclusive and these shall be printed.

/s/ ARTHUR B. DUNNE,
/s/ JOHN W. MARTIN,
DUNNE, DUNNE & PHELPS,
Attorneys for Appellant Southern Pacific Company.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 28, 1959. Paul P. O'Brien, Clerk.

No. 16592

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD H. CLINTON,

Appellant,

vs.

JOSHUA HENDY CORPORATION,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

No. 16592

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD H. CLINTON,

Appellant,

vs.

JOSHUA HENDY CORPORATION,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

The appellant filed a libel in admiralty against the appellee in the United States District Court for the Southern District of California in action number 19061-WM. In the eighth "cause of action" therein the appellant alleged that the Joshua Hendy Corporation, acting through its chief mate, had caused the International Organization of Masters, Mates and Pilots to breach its contract with the appellant by suspending and then expelling him from such union.

In the answer filed on behalf of the appellee, the fourth separate defense to the eighth cause of action was that the Court sitting in admiralty did not have jurisdiction of the action as it was for a non-maritime tort.

On January 11, 1956, the District Court of (The Honorable William C. Mathes) dismissed the eighth cause of action on the ground that the alleged tort was not a maritime tort and thus was not within the admiralty jurisdiction of the court.

This order of the court dismissing the eighth cause of action was appealed to United States Court of Appeals for the Ninth Circuit in action number 15056 entitled Richard H. Clinton v. International Oranization etc. The lower court order dismissing the action was affirmed, the Court of Appeals holding that the lower court had no jurisdiction over the matter.

The appellant moved the Court of Appeals in said appeal No. 15056 to amend the libel so as to cure a jurisdictional defect but such motion was denied by the Court of Appeals on October 18, 1958.

The libelant then on July 29, 1959, moved the District Court for an order amending the order of dismissal of the action. This motion was denied by the District Court on July 31, 1959, whereupon the libelant began the present appeal to the Court of Appeals on August 7, 1959.

Argument.

Under the Admiralty Rules the matter of amending a pleading as to substance is within the discretion of the District Court.

Admiralty Rule No. 23.

The District Court denied the appellant's motion to amend and such was within the discretion of the Court.

There is no showing in the appellant's proposed second amended libel that his alleged cause of action is a maritime tort within the admiralty jurisdiction of the court.

There is no allegation as to where the breach of the contract between the union (International Organization of Masters, Mates and Pilots) and the appellant took place. On page 16 of the transcript of record it appears that the appellant was expelled from membership in the union, which was the source of his alleged damage, at a "trial committee hearing." The location of the same is not set forth in the proposed second amended libel.

Further, the minute order of the District Court entered July 31, 1959 [Tr. of R. p. 22] was in order for the reason that the proposed second amended libel does not state a cause of action against the appellee which was one of the special defenses entered in the appellee's answer to the original libel [Tr. of R. p. 7].

The only allegation of the effect of the allegedly defamatory letter sent by the officer of the vessel was that it "caused the International Organization, *et al.,* to bring charges against the libelant's Full Book Membership of said maritime union" [Tr. of R. p. 16]. The proposed second amended libel does not allege anywhere that the "defamatory" letter was the cause of the libelant being found guilty as charged of his violation of his obligation to his union. The libelant alleges that he was found guilty as charged when he was tried by a trial committee of the union [Tr. of R. p. 16] but there is no evidence as to whether the finding of the trial committee was based on the testimony of witnesses, other documentary evidence or upon what evidence at all. Accordingly, it is respectfully submitted that the proposed second amended libel did not state a cause of action as it failed to show that the allegedly defamatory letter was the proximate cause of the appellant's expulsion from his union which is, of course, the entire basis of his alleged damages.

Conclusion.

It is respectfully submitted that the action of the District Court in dismissing the libelant's motion for an amendment to the order dismissing the libel and the District Court's refusal to allow the proposed second amended libel to be filed should be approved and affirmed for the following two reasons:

1. The action being one for a non-maritime tort, there is no admiralty jurisdiction here.

2. The proposed second amended libel did not state a cause of action against appellee as there was no causal connection between the allegedly defamatory letter and the expulsion of the appellant from his union.

Respectfully submitted,

Robert Sikes,

Proctor for Appellee, Joshua Hendy Corporation.

No. 16618

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MELVIN A. PIXLEY, d/b/a Furniture Freight Forwarders and/or Furniture Fast Freight, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif—1-29-60

No. 16618

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MELVIN A. PIXLEY, d/b/a Furniture Freight Forwarders and/or Furniture Fast Freight, a Corporation,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

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United States District Court, Southern District of California, Central Division

Civil No. 313-58—HW

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MELVIN A. PIXLEY, d/b/a Furniture Freight Forwarders and/or FURNITURE FAST FREIGHT, a Corporation,
Defendants.

COMPLAINT FOR RESTITUTION

Plaintiff, United States of America, complains of defendants and for cause of action alleges:

I.

This is a suit by the United States of America of which this Court has jurisdiction under 28 U.S.C. 1345.

II.

The defendant, Furniture Fast Freight, is a corporation organized under the laws of the State of California, having its principal place of business at Los Angeles, California, within the Central Division of the Southern District of California and within the jurisdiction of this Honorable Court.

III.

The defendant, Melvin A. Pixley, d/b/a Furniture Freight Forwarders and/or Furniture Fast Freight is a resident of the County of Los Angeles, State of California, within the Central Division of the Southern District of California and within the jurisdiction of this Honorable Court.

IV.

At all times material to this case, the defendants, in numerous transactions, furnished to the plaintiff, trucking, hauling, and other freight transportation services, and was and is a common carrier subject to the Interstate Commerce Act, as amended, within the meaning of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66.

V.

The furnishing of such services in all such transactions, was, as to payment therefor by the plaintiff, subject to the terms of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, in that plaintiff was required to make payment for the furnishing of said services, upon the presentation of the bills therefore by the defendants, prior to audit or settlement by the General Accounting Office of the plaintiff, but with the right reserved to the plaintiff to deduct the amount of any overpayment to the defendants from any amount subsequently found to be due defendants.

VI.

In every such transaction of the furnishing of such services to the plaintiff, the defendants submitted their bill and voucher for payment therefor to the plaintiff. The plaintiff in every instance upon presentation of said bill and voucher and acting through its duly authorized disbursing officer, made payment to the defendants in the amounts stated in such bill and voucher, prior to audit or settlement of said bill or voucher by the General Accounting Office of the plaintiff.

VII.

Each such transaction of the furnishing of such services and the payment made as aforesaid is listed and described as a separate item in the entries incorporated below in this paragraph, in tabulations prepared by the Transportation Division of the General Accounting Office, copies of which are attached hereto as Exhibits A, B, C, D, E and F. The entries in the following entitled columns of Exhibits A, B, C, D, E and F are incorporated in this paragraph by reference as if fully set forth:

"Item No.

"Carrier's Bill No.

"Bill of Lading (Number, Date).

"Origin.

"Destination.

"Commodity.

"Weight.

"Amount Paid."

VIII.

In due course the General Accounting Office proceeded to audit and settle the aforesaid bills and vouchers presented by the defendants, as a result of which, that Office determined the amount properly and lawfully due in settlement of each bill or voucher. Such proper and lawful amount due is set forth, as to each item listed in Exhibits A, B, C, D, E and F attached hereto, in the column entitled:

"Charge Should Be (Rate cwt. Amount.)"

IX.

As to each item listed on Exhibits A, B, C, D, E and F, the "Amount Paid" was in excess of the

amount properly and lawfully due in settlement of such item by the amount listed in Exhibits A, B, C, D, E and F in the column entitled:

"Overpayment."

X.

All of the aforesaid overpayments are moneys had and received by the defendants to the use and benefit of the plaintiff. The total amount of those overpayments is in the sum of $17,666.77. Plaintiff has demanded of defendants said sum plus proper interest thereon, but none of said overpayments or any part of them have been repaid by the defendants to the plaintiff; but all of them remain due, owing and unpaid to the plaintiff.

Wherefore, plaintiff prays judgment as follows:

(a) For the total of said overpayments in the sum of $17,666.77;

(b) For interest at the rate of 6 per cent per annum on the amount of each overpayment from the date of payment;

(c) For costs; and

(d) For such other and further relief as the Court may deem proper.

LAUGHLIN E. WATERS,
United States Attorney;
RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division;

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed April 9, 1958.

[Title of District Court and Cause.]

ANSWER

Come Now Melvin A. Pixley and Pixley Transportation, a corporation (sued herein as Furniture Fast Freight), and answer the complaint on file herein by admitting, denying and alleging as follows:

I.

Answering paragraph II, allege that prior to the filing of the complaint herein, the corporation sued as Furniture Fast Freight had changed its name to Pixley Transportation.

II.

Answering paragraph III, allege that defendant Melvin A. Pixley is not doing business as Furniture Freight Forwarders or Furniture Fast Freight.

III.

Answering paragraph IV, deny, that any defendant at any time was or is a common carrier subject to the Interstate Commerce Act, as amended, within the meaning of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, or otherwise.

IV.

Answering paragraph V, deny, generally and specifically, each and every allegation contained therein and the whole thereof.

V.

Answering paragraph VI, allege that said transactions involved defendant Melvin A. Pixley only,

and did not involve Pixley Transportation, formerly known as Furniture Fast Freight.

Further answering said paragraph, defendants do not have sufficient information or belief to enable them to answer the allegation that payment was made to defendant Melvin A. Pixley prior to audit or settlement of said bill or voucher by the General Accounting Office of the plaintiff, and basing their answer on lack of information or belief deny said allegation.

VI.

Answering paragraph VIII, deny, generally and specifically, each and every allegation contained therein and the whole thereof, and deny that the proper or lawful rates or charges are set forth in the exhibits attached to the complaint, and deny that said exhibits reflect the proper and lawful amount due to plaintiff, and deny that any amount is due plaintiff from defendants, or either of them.

VII.

Answering paragraph IX, deny, generally and specifically, each and every allegation there set forth and the whole thereof, and deny that any overcharge has been made by defendants, or either of them, and deny that plaintiff has paid any defendant any overpayment.

VIII.

Answering paragraph X, deny, generally and specifically, each allegation set forth therein and the whole thereof and deny that the total amount of the overpayments is $17,666.77, or any other amount,

and deny that any overpayment has been made. Further answering said paragraph, allege that the first demand made upon defendants, or either of them, for the refund of any alleged overpayments occurred in September of 1952, and allege that on or before August 15, 1956, defendants declined all claims of the plaintiff and denied that any amount was due to plaintiff.

For a Second, Separate and Affirmative Defense, Defendants Allege:

I.

The above-entitled court lacks jurisdiction of the subject matter of the complaint because the alleged cause of action became totally extinguished prior to the commencement of this action.

For a Third, Separate and Affirmative Defense, Defendants Allege:

I.

The complaint fails to state a claim against the defendants, or any of them, upon which any relief can be granted.

For a Fourth, Separate and Affirmative Defense, Defendants Allege:

I.

Each claim of plaintiff in connection with each shipment mentioned in the complaint was extinguished prior to the institution of the subject action by reason of the failure of the plaintiff to file any claim with any defendant or to institute suit within

the period of time provided by the Public Utilities Code of the State of California and within the period of time prescribed by Section 736 of said Code.

Wherefore, defendants, and each of them, pray that plaintiff take nothing by its complaint on file herein, and that they be dismissed hence with their costs of suit, and such other relief as the court may deem proper.

TURCOTTE & GOLDSMITH,

By /s/ J. O. GOLDSMITH,
Attorneys for Defendants.

[Endorsed]: Filed January 30, 1959.

[Title of District Court and Cause.]

PRETRIAL STIPULATION OF FACTS AND ISSUES

I.

Facts

The following facts are stipulated to by the parties herein and will require no proof at the time of trial:

1. At all times herein involved defendant, Melvin A. Pixley, was a highway common carrier of furniture and certain related commodities from, to and between the points herein involved pursuant to certificates of public convenience and necessity

theretofore issued to him by the Public Utilities Commission of the State of California authorizing said Pixley to transport furniture and certain related articles over the public highways of the State of California and not otherwise.

2. All of the shipments involved in this proceeding were tendered by the plaintiff to the defendant, Melvin A. Pixley, for transportation at a point in California to a destination in California and moved only over the public highways of the State of California.

3. The first shipment involved in this case was transported and delivered by defendant, Pixley, on July 3, 1943, under Bill of Lading NHA-FPHA 25270, and moved from Inglewood, California to San Francisco, California. The last shipment involved herein was delivered on October 10, 1947, and moved from Los Angeles, California, to San Francisco, California, under Bill of Lading No. HAPH 255736.

4. During the period in which Pixley received and transported the shipments of furniture and other household articles enumerated in plaintiff's complaint, Pixley, as such common carrier, had on file with the Public Utilities Commission of the State of California, his tariffs of rates, rules and regulations, designated Furniture Fast Freight Tariff No. 1, Public Utilities Commission No. 1 prior to February 13, 1944, and Furniture Freight Forwarders Tariff No. 100, California Public Utili-

ties Commission No. 1, on and after February 13, 1944.

5. Pixley, after transporting the involved shipments from origin to destination, and after delivering the same to the consignee at destination, issued his freight bill setting forth his charges for his services in the transportation of said shipments from origin to destination, and presented the same to the United States of America for payment. All of the shipments involved were delivered by Pixley to the consignees named in the bills of lading on or before October 11, 1947.

6. The Federal Public Housing Authority is an agency of the United States Government and it constructed housing accommodations used by persons as their homes and residences.

7. All transportation herein involved was performed for the plaintiff and all moved on Government bills of lading.

II.

Issues to Be Tried

1. Is this case governed by the Public Utilities Code of the State of California, and particularly by Section 736 of said Code?

2. If the Code or particular section of said Code mentioned in the preceding number controls in this case, has the same extinguished prior to the institution of the subject action each claim of plaintiff in connection with each shipment mentioned in the complaint, at least in connection with all shipments

pertaining to uncrated new furniture and related commodities, being the commodities for which defendants hold a certificate of public convenience and necessity from the State of California?

3. Is this case governed by Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, and is said statute pertinent to this lawsuit in any respect?

4. Is this case governed by the Act of June 1, 1942, Title 31, U.S.C., Sec. 82(g), and is said statute pertinent to this law suit in any respect?

5. Is any defendant a common carrier subject to the Interstate Commerce Act, as amended, within the meaning of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, or otherwise?

6. Was the furnishing of the transportation services involved in this case, as to payment therefor by the plaintiff, subject to the terms of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66?

7. Were all of the component parts of each shipment as listed on each individual bill of lading involved in this case tendered to one of the defendants at one time for transportation in accordance with such bill of lading?

8. Has there been any overpayment from the plaintiff to any defendant in connection with the shipments referred to in the complaint and if so what is the amount of the overpayment?

9. Was any claim made by the plaintiff against any defendant for any alleged overcharge on any ship-

ment involved within three years from the date of the delivery of said shipments?

10. Of the amount sought to be recovered, viz.: $17,666.77, did $436.63 consist of Federal Transportation Tax of 3% of the amount of the freight charges assessed and collected on 48 shipments so transported by Pixley for the plaintiff. If so, was the $436.63 so collected as a transportation tax from the plaintiff by Pixley for and on behalf of the United States of America as a Federal tax, and did Pixley remit the amount so collected by him to the United States of America as a Federal tax on the transportation of said shipments, and has Pixley retained any part or portion of the said tax so collected; and was said transportation tax remitted by Pixley to the plaintiff and paid to the United States of America, many years prior to the commencement of this action?

Dated: This 24th day of February, 1959.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division;

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney,
Attorneys for Plaintiff.

TURCOTTE & GOLDSMITH,

By /s/ JACK O. GOLDSMITH,
Attorneys for Defendants.

It Is So Ordered:

This 26th day of Feb., 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed February 26, 1959.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

The following additional facts are stipulated to by the parties herein and will require no proof at the time of trial:

1. On August 15, 1956, the defendant Pixley declined all claims of plaintiff and informed the plaintiff, in writing, that no overcharge existed and that Pixley was not indebted to plaintiff for any overcharge, or otherwise.

2. Add to the Pretrial Stipulation of Facts and Issues, dated February 24, 1959, at page 1, line 32, after the word California the words "at said carrier's tariff rates."

3. No defendant at any time had on file with the Interstate Commerce Commission any tariff covering any movement from, to or between any of the points pertinent to the above-captioned proceeding.

Dated: March 16, 1959.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

BURTON C. JACOBSON,
Assistant U. S. Attorney;

/s/ BURTON C. JACOBSON,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

TURCOTTE & GOLDSMITH,

By /s/ JACK O. GOLDSMITH,
Attorneys for Defendants.

It Is So Ordered this 25th day of March, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed March 25, 1959.

EXHIBIT A

Standard Form No. 1103
Form approved by
Comptroller General, U. S.
1943

U. S. GOVERNMENT BILL OF LADING

ORIGINAL

J- 425817

CAR INITIALS AND NO.

DO NOT WRITE IN THIS SPACE

NAME OF INITIAL TRANSPORTATION COMPANY

TRAFFIC CONTROL NO.

STOP THIS CAR AT For

IMPORTANT
THE SHIPPER MUST SEND THIS ORIGINAL OF THE BILL OF LADING TO THE CONSIGNEE IMMEDIATELY.
SEE REVERSE HEREOF

SIZE CAR IN FEET		MARKED CAPACITY OF CAR			
ORDERED	FURNISHED	ORDERED	FURNISHED	DATE CAR FURNISHED	DATE B/L ISSUED

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE, SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PUBLIC PROPERTY HEREINAFTER DESCRIBED, IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES, THERE TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

FROM

SHIPPING POINT

FROM (FULL NAME OF SHIPPER)

MARKS

CONSIGNEE

CHARGES TO BE BILLED TO (DEPARTMENT OR ESTABLISHMENT AND BUREAU OR SERVICE AND LOCATION)
Department of Justice
Division of Accounts, Wash. 25, D. C.

DESTINATION

VIA (ROUTE JOURNEY ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS RESERVED THEREBY)

APPROPRIATION CHARGEABLE

ISSUING OFFICE

NAME AND TITLE OF ISSUING OFFICER

PICK-UP SERVICE AT ORIGIN ..... BY THE GOVERNMENT OR ITS AGENT.
(INSERT "YES" OR "NOT")

† FURNISH THIS INFORMATION IN CASE OF CARLOAD SHIPMENTS ONLY.
* SHOW ALSO CUBIC MEASUREMENTS FOR SHIPMENTS VIA OCEAN CARRIER IN CASES WHERE REQUIRED.

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE .....

PACKAGES		DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS*	FOR USE OF DESTINATION CARRIER ONLY				
NO.	KIND				CLASS	RATE GROSS	RATE NET	CHARGES DOLLARS	CHARGES CENTS

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. ..... DATED .....
OR OTHER AUTHORITY FOR SHIPMENT

..... (F. O. B. POINT NAMED IN CONTRACT)

SIGNATURE OF ISSUING OFFICER

NAME OF TRANSPORTATION COMPANY

COMPANY

DATE OF RECEIPT OF SHIPMENT

SIGNATURE OF AGENT

PER

CONSIGNEE'S CERTIFICATE OF DELIVERY—CONSIGNEE MUST NOT PAY ANY CHARGES ON THIS SHIPMENT

..... (NAME OF TRANSPORTATION COMPANY AND ACTUAL POINT OF DELIVERY)

..... POUNDS
(GROSS WEIGHT IN BOTH WORDS AND FIGURES)

..... (DATE)

I CERTIFY THAT I HAVE THIS DAY RECEIVED FROM THE TRANSPORTATION COMPANY NAMED IN THIS CERTIFICATE THE PUBLIC PROPERTY DESCRIBED IN THIS BILL OF LADING IN APPARENT GOOD ORDER AND CONDITION, EXCEPT AS NOTED ON THE REVERSE HEREOF, AND THAT DELIVERY SERVICE AT

DESTINATION ..... BY THE GOVERNMENT OR ITS AGENT.
(INSERT "YES" OR "NOT")

..... (SIGNATURE OF CONSIGNEE)

16—94109-8

16

ADMINISTRATIVE DIRECTIONS

1. Government property will be transported on the presented form of Government bill of lading (original, shipping order, Government freight waybill—original, Government freight waybill—carrier's copy, and memorandum bill of lading), unless otherwise directed by proper authority, which will be identified by serial numbers following issue of forms approved by or under the General Accounting Office.

2. No bill of lading will be issued in all instances between bureaus and offices (agencies), except when funds have been advanced to the Government may be otherwise secured.

3. When shipments are made under contract or special rates, notation of such fact should appear on the face of bills of lading.

4. Officers charged with the duty of providing or securing transportation, transportation, and handlers themselves with land-grant controls in order that shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing such controls.

5. In those departments and establishments which state property the bureau of which is subject to land-grant rates, and where such rates may be applicable over all or part of the route, the words "Military" or "Nonmilitary" should be placed on the original bill of lading and all copies thereof by a completely manner immediately preceding the first item in the column headed "Description of Articles." If the same bill of lading covers both "Military" and "Nonmilitary" items, appropriate notations should be used, each conspicuously identified.

6. Bills of lading should describe the articles shipped by the carriers' classification or tariff description, if possible, otherwise use a clear, functional description, and add departmental nomenclature in parentheses if necessary for weights, dimensions, and manner of packing as may be necessary to ascertain classifications and rates and to enable verifying in case of loss or damage.

7. If the number of articles to be shipped is too great for the bureau freight, shipping order, Government freight waybill—original, Government freight waybill—carrier's copy and memorandum copy) continued sheets of the prescribed form should be used, and so numbered and designated as to form one bill of lading, under one number.

REPORT OF LOSS, DAMAGE, OR SHRINKAGE

Notice is hereby given the carrier to whom this bill of lading is surrendered that the shipment was received in condition shown below and that claim is made for the value of such loss, damage, or shrinkage as indicated.

Explanation regarding loss, damage, or shrinkage to be made by consignee, who will state all the facts available concerning the nature or extent of the loss, damage, or shrinkage, and how it occurred.

The within shipment was received with the following loss, damage, or shrinkage:

Description: .....

.....

.....

.....

Weight of such articles .....pounds.

Invoice value or cost of repairs, $.....

I certify that the facts noted above are correct.

.....
Consignee

By .....

Title .....

GENERAL CONDITIONS AND INSTRUCTIONS

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation of this bill of lading, properly accomplished and attached to freight voucher prepared on the authorized Government form, to the office indicated on the face hereof, payment will be made to the last carrier, unless otherwise specifically stipulated.

2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

3. Shipment made upon this bill of lading shall take no higher rate than would be charged had the shipment been made upon the uniform straight bill of lading or uniform express receipt.

4. No charge shall be made by any carrier for the execution and presentation of bills of lading in manner and form as provided by the instructions hereon.

5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof.

6. Receipt of the shipment is made subject to the "Report of Loss, Damage, or Shrinkage" noted hereon.

7. In case of loss, damage, or shrinkage in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carriers or to period within which claim therefor shall be made or suit instituted.

8. Carrier's rights to shipping charges are not affected by facts set out in the certificate of issuing officer.

INSTRUCTIONS

(See also General Regulations No. 97, issued April 13, 1942, by the Comptroller General of the United States.)

1. Erasures, interlineations, or alterations in bills of lading must be authenticated and explained by the person making them.

2. Original bill of lading, shipping order, Government freight waybill—original, Government freight waybill—carrier's copy, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order, Government freight waybill—original, and Government freight waybill—carrier's copy should be furnished the initial carrier. The original bill of lading and, if administratively requested, not more than 2 memorandum copies will be signed (legible carbon impression signatures will be accepted) by the agent of the receiving carrier, returned to the consignor, and the original promptly sent to the consignee. The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The original bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.

3. In the absence of the consignee, or on his failure to receipt, the person receipting will certify that he is duly authorized to do so, reciting such authority.

4. In no case will a second bill of lading be issued for a shipment, nor will a bill of lading be issued after the transportation has been performed, except in the conversion of a commercial bill of lading as provided for in the above-cited General Regulations. In case the bill of lading has been lost or destroyed, the carrier shall be furnished by the consignee with a certificate in lieu of lost bill of lading, on the standard form prescribed therefor which, when finally consummated by acknowledgment of the certificate and waiver by transportation company, shall accompany the bill for services submitted by the carrier to the officer charged with the settlement of the account. If the original bill of lading be located after settlement has been made on the certificate, it will be forwarded to the administrative office of the department concerned for transmittal to the General Accounting Office.

5. To insure prompt delivery of property, in the absence of the bill of lading, the consignee should give to the carrier a temporary receipt, executed on the prescribed form, for the property actually delivered. On the recovery of the bill of lading or when the certificate provided for above shall have been given, a statement will be indorsed on said bill of lading or certificate of the fact of the delivery as per said temporary receipt, and the said temporary receipt will be indorsed with reference to the bill of lading or certificate sufficient to identify the same, and both papers attached and forwarded with the claim for payment thereon.

6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading or certificate has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage and extended privilege of examining shipment. Loss or damage for which a carrier is responsible will be deducted in making settlements for the services.

7. Bills must be submitted by the general officers of carriers on voucher forms approved by the Comptroller General of the United States and such forms may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C. A voucher when submitted for settlement shall cover charges to one office or service only and there must be furnished with each bill of lading, where land-grant deductions are involved, the basis or formula of carriage as the net amount claimed unless this information has been previously furnished. Also tariff authority, commodities, or special rate reference must be shown in all cases unless previously furnished. Correspondence regarding transportation accounts shall be addressed to the particular office or service and reference made to the letter symbol and serial numbers of the Government bills of lading included in the company's bill.

SPECIAL NOTICE

The space on this bill of lading headed "FOR USE OF DESTINATION CARRIER ONLY" must not be covered by writing or marks. It is for the sole use of the accounting officer of the destination carrier.

U. S. GOVERNMENT PRINTING OFFICE 16—30000-1

Endorsed: Filed March 31, 1959.

[Title of District Court and Cause.]

OPINION

The government filed a complaint for restitution against the above-named defendants, alleging jurisdiction under Title 28 U.S.C. § 1345, which reads as follows:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

The complaint alleges that defendants in numerous transactions furnished to plaintiff trucking, hauling and other freight transportation services and "was and is a common carrier, subject to the Interstate Commerce Act, as amended, within the meaning of Section 322 of the Transportation Act of 1940, 49 U.S.C. § 66." This section provides:

"Payment for transportation of the United States mail and of persons or property for on on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

The complaint alleges defendants submitted their bills and vouchers for payment to plaintiff; that plaintiff made payment without audit, but that subsequently the General Accounting Office proceeded to audit and settle the bills and vouchers presented by defendants, and that office determined there had been a total overpayment of bills and vouchers as presented by defendants in the sum of $17,666.77. As a consequence of such audit the government commenced this action, demanding judgment for the aforesaid sum with interest and costs.

After the complaint was filed defendants moved to dismiss on the ground the complaint failed to state a claim and the Court lacked jurisdiction of the matter in controversy. In support of the motion to dismiss defendants filed various affidavits and points and authorities. A hearing was duly had upon defendants' motion to dismiss and for summary judgment, and thereafter said motions were denied.

Subsequently a pretrial was held by the Court, and the parties were ordered to present and file a pretrial statement of facts and issues involved. In due course of time a pretrial stipulation of facts and issues was filed by the respective parties, and the matter is now submitted to the Court for decision based upon the stipulation of facts and issues involved.

Three issues are now before the Court for decision:

1. Jurisdiction.

2. Whether plaintiff's cause of action was extinguished prior to filing the complaint; and

3. Whether plaintiff or defendants must sustain the burden of proof at a trial on the merits.

Plaintiff contends this Court has jurisdiction on the theory that defendants are common carriers, subject to the Interstate Commerce Act.

The stipulation of facts filed herein indicates that all shipments involved in these proceedings were tendered by plaintiff to defendants at a point in California for transportation to a destination in California and moved only over the public highways of the State. All transportation herein involved was performed for plaintiff by the defendants and moved on government bills of lading. None of the defendants at any time had on file with the Interstate Commerce Commission any tariff covering movement from, to or between any of the points pertinent in these proceedings. However, defendants, prior to said conveyances, had obtained a certificate of public convenience and necessity from the Public Utilities Commission of the State of California, authorizing defendants to transport furniture and certain related articles over the public highways of the State of California and not otherwise and had duly filed with the Public Utilities Commission as required its tariff schedule. Charges were alleged to have been made to the government by defendants in accordance with the tariff schedule.

There is no evidence in this case to indicate defendants at any time have engaged in transporta-

tion of any materials in interstate commerce. In fact, all shipments originated within the State of California and were delivered to points within the State. Defendants at no time attempted to comply with any requirement of the Interstate Commerce Act and did not file with the Interstate Commerce Commission any tariff covering movement of freight between points in the State of California or otherwise.

The government evidently contends that inasmuch as the freight in question was moved under government bills of lading it is necessarily implied that defendants were engaged in the movement of freight in interstate commerce. However, we are not of the opinion that any fact has been presented in this case which could lead to a conclusion that defendants or any of them at any time were engaged in interstate commerce. It is stipulated that defendants handled only intrastate merchandise. To maintain its position in this case the government must establish the common carrier in question is subject to the Interstate Commerce Act. We do not believe the government has so established.

A somewhat similar problem was presented in the case of Hughes Transp., Inc. vs. United States (Court of Claim, May 4, 1954), 121 F.Supp. 212. In that case the merchandise was transported over the public highways of the State of Kentucky from one federal enclave to another federal enclave, both situated within the State of Kentucky. The Court of Claims, at page 220, said:

"In the instant case the contract of carriage involved the transportation of property belonging to the federal government as shipper-consignee, by a contract carrier by motor vehicle licensed to do business in the Commonwealth of Kentucky. The performance of the contract necessitated the use of state highways between federal enclaves located wholly within the geographical boundaries of Kentucky * * * We do not agree with defendant that transportation over a State's highways between two federal enclaves, located within a single State, amounts to interstate commerce. There is no federal legislation to support this view and there is nothing in the definition of 'interstate commerce' in the Federal Motor Carrier Act which supports such a conclusion."

In the instant case the government contends it is entitled to recovery under the Public Utilities Act of California. However, the Public Utilities Act of California provides that claims based upon an overcharge such as alleged in the case at bar must be filed within three years after accrual of the cause of action. According to the stipulation of facts on file, the first shipment involved in this case was transported and delivered by defendants on July 3, 1943, and the last shipment was delivered on October 10, 1947. A period of nearly eleven years has elapsed between the last shipment claimed and the filing of the complaint.

Section 322 of the Transportation Act of 1940, 49 U.S.C. § 66, evidently has a three-year limitation

from the accrual of the cause of action, and the cause of action commenced upon payment. The defendants contend the government's action is barred by Section 736 of the California Public Utilities Code, which provides a three-year period for filing of complaints based upon overcharge. However, the government asserts that this is a statute of limitations; that it is not bound by such statute and that its claim is timely, even though presented after expiration of the three-year period.

It is the rule that ordinarily the government is not bound by a statute of limitations. There appear to be exceptions to the rule. Defendants allege this is not an ordinary statute of limitations but that upon the expiration of the period of time not only is the lawsuit barred but the very cause of action itself is automatically extinguished. Such seems to be the ruling of both the Interstate Commerce Commission and of the federal courts.

In Louisville Cement Co. vs. Interstate Commerce Commission (1918), 246 US 638, a mistake had been made in printing a tariff, and charges had been made according to the printed tariff. At that time, Section 16 of the Act to Regulate Commerce provided: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after." The Interstate Commerce Commission held it was jurisdictional that claims to be filed within the stated period. Upon a review of the Commission's conclusion, the Supreme Court said, at page 642:

"We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation but is jurisdictional—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion * * *"

In 1925 the Supreme Court again ruled that the running of the time destroyed liability and stated:

"* * * It is settled by the decisions of this court that the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff. [Citations]. On the expiration of the two-year period, it was as if liability had never existed * * *"

—Danzer & Company, Inc. vs. Gulf & Ship Island Railroad Company, 268 US 633 at 636.

In 1943 the Supreme Court spoke again in regard to this matter in Midstate Horticultural Co., Inc. vs. Pennsylvania Railroad Co., 320 US 356, stating at page 363:

"With the one exception, the decisions have fixed the pattern, in respect to a variety of issues relating to application of the limitations, that lapse of the statutory period 'not only bars the remedy but destroys the liability.' That is true of this Court's decisions and those of the inferior federal courts.

* * *

"The purport of the decisions is that Congress intended, when the period has run, to put an end

to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished * * * In United States ex rel. Louisville Cement Co. vs. Interstate Commerce Comm's, 246 U.S. 638 * * * [t]he Court held that the limitation goes to the Commission's jurisdiction, so that on the one hand it has no power to act when the time has expired * * *"

From the above it is concluded plaintiff's cause of action does not arise under Title 49 U.S.C. § 66, inasmuch as the common carrier mentioned herein was not subject to the Interstate Commerce Act. Even if it were subject to the Act, the so-called cause of action has, nevertheless, been extinguished.

If the government had a claim under the Public Utilities Code of California, it is either barred or has been extinguished by the running of time.

We are of the opinion this Court has no jurisdiction of the claims as set forth by plaintiff and that the action should be dismissed.

Dated this 24th day of April, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed April 24, 1959.

[Title of District Court and Cause.]

STIPULATION

Plaintiff and defendants, through their respective counsel, hereby stipulate that the opinion of the Court filed in the above-entitled action on April 24, 1959, may be, and the same hereby is, the Findings of Fact and Conclusions of Law of the said Court in the above-entitled action.

Dated this first day of May, 1959.

LAUGHLIN E. WATERS,
RICHARD A. LAVINE,
BURTON C. JACOBSON,

By /s/ BURTON C. JACOBSON,
Attorneys for Plaintiff.

TURCOTTE & GOLDSMITH,

By /s/ J. O. GOLDSMITH,
Attorneys for Defendants.

It Is So Ordered this 1st day of May, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed May 1, 1959.

United States District Court, Southern District of California, Central Division

Civil No. 313-58—HW

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MELVIN A. PIXLEY, d/b/a Furniture Freight Forwarders and/or FURNITURE FAST FREIGHT, a Corporation,
Defendants.

JUDGMENT

Pursuant to the Court's Findings of Fact and Conclusions of Law filed in the above-entitled action, and good cause appearing,

It Is Hereby Ordered, Adjudged and Decreed that the above-entitled action be, and the same hereby is, dismissed.

Dated this 1st day of May, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

Approved as to form:

LAUGHLIN E. WATERS
RICHARD A. LAVINE,
BURTON C. JACOBSON,

By /s/ BURTON C. JACOBSON,
Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1959.
Entered May 4, 1959.

[Title of District Court and Cause.]

MOTION TO RECONSIDER

Comes Now the plaintiff, United States of America, and respectfully moves the court to reconsider its ruling contained in its Opinion filed April 24, 1959, in which it dismisses the plaintiff's action on the grounds that the court has no jurisdiction inasmuch as the Government's action is barred by a statute of limitations contained in the California Public Utilities Code.

Dated: This 6th day of May, 1959.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division;

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney,
Attorneys for Plaintiff.

EXHIBIT A

AFFIDAVIT

Washington,
District of Columbia—ss.

Hillis K. Wilson, being duly sworn, deposes and says:

I have been employed in the transportation organization of the U. S. General Accounting Office continuously since May 14, 1934, in the capacity of Examiner; Reviewer; Review Examiner; Assistant Chief, Freight Review Section; Chief, Freight Review Section; and since September, 1947, as Chief, Freight Subdivision. One of the functions of the General Accounting Office, under the provisions of 31 U. S. C. 71, is the examination and audit of paid bills for transportation of property for the United States by foreign and domestic common and contract carriers by rail, water, highway, air, or combinations thereof.

Prior to 1941 the Military Departments (War, Navy, and U. S. Marine Corps) audited carrier's bills prior to payment therefor, and thereafter such bills were subjected to a postaudit in the General Accounting Office.

Prior to 1941 payments for transportation performed for the civil agencies of the United States Government were audited in the General Accounting Office prior to payment, with some minor exceptions in the case of certain Governmental field establishments.

Any excess amount determined in the prepayment audit was adjusted by a reduction in the carrier's bills and a certification to a paying officer as to the reduced amounts payable with a technical explanation of the difference between the amounts claimed by the carrier and certified for payment by the pay-

ing officer. The technical explanation of the difference was furnished the carrier with the disbursing officer's check for the reduced sum.

Prior to 1941 any overpayment determined in the postaudit or audit after payment by a disbursing officer was stated as an exception in the settlement of the disbursing officer's account. Such exceptions embodied reference to carriers' bills, the bills of lading overpaid, showing as to each bill of lading the amounts paid, the amounts determined by the postaudit to be assessable and the sums overpaid, and technical authority or bases (published tariffs or special agreement) for the stated overpayments. These exceptions were a withholding of credit in the disbursing officer's accounts for the periods of payment and, generally speaking, the disbursing officers furnished the payee carrier with pertinent parts of the exception and demanded repayment of the amount suspended. Upon failure to receive repayment or justification for the stated overpayment, the disbursing officer recovered the overpayment by setoff against any subsequent amount found due the overpaid carrier. Thus, the disbursing officer was forced to make the adjustment with the overpaid carrier in order to reconcile his accounts.

Congress enacted the Transportation Act of 1940, approved September 18, 1940, and Section 322 of this Act, 54 Stat. 1955, 49 U.S.C. Section 66, provides that "Payment for transportation * * * of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Com-

merce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

The legislation enacted to relieve certifying and disbursing officers of responsibility for technical accuracy of carriers' bills, and the cited provisions of the Transportation Act, 1940, caused the General Accounting Office to forego statement of suspensions against the disbursing officers. 31 U.S.C. 82, 82b, 82c, 82g. Effective with the audit of payments made after enactment of the Transportation Act of 1940, claims have been prepared and forwarded by the General Accounting Office to the payee carrier for any overpayments determined in the audit. Collection of overpayments determined to be due the United States which were not refunded or justified by the carrier upon demand therefor have been accomplished by set-off, as provided in the cited Section 322.

Generally speaking, each carrier requires that Government bills of lading be forwarded to either a central or regional accounting office for audit and billing purposes. These bills of lading become the document or subvoucher supporting the carrier's claim for transportation charges and, under 4 C.F.R. section 52.24, 1958 Supplement, are attached to a

Public Voucher For Transportation Charges. This voucher form and the attached bills of lading become the carrier's bill for transportation charges and are submitted to a designated paying office of the Government agency for which the transportation service is performed. A carrier's bill may be supported by many bills of lading; some for interstate shipments and some for intrastate shipments, without separate totaling of the charges due. It is not feasible for paying officers to subject these bills, with both interstate and intrastate bills of lading attached, to two procedures. The carriers billing for intrastate service do not, of course, object to prompt payment. Under this type of arrangement, the payments must be subjected to postaudit in order to protect the interests of the Government. The system of audit avoids confusion in the handling of the great volume of paper, expedites the disposition and settling of public accounts, and is economically advantageous to the interested carriers and the Government. Because the audit of transportation charges is highly technical and requires considerable time, a prepayment audit of intrastate bills of lading would subject the payment of interstate bills of lading in the same bill to inordinate delay and would operate to defeat the purpose of the "payment upon presentation" provision of the Transportation Act, 1940.

From July 1, 1949, through June 30, 1958, a period of ten fiscal years, the Transportation Division, General Accounting Office, had audited over 16 million bills submitted by foreign and domestic common and contract carriers by all modes of transpor-

tation. These bills or paid vouchers in disbursing officers' accounts were supported by over 76 million bills of lading and accounted for an expenditure of approximately 12½ billions of dollars of Public Funds. Claims to recover overpayments were stated by the Transportation Division on over 900,000 of these carriers' bills and almost 400 millions of dollars have been collected by refund or by set-off. In this connection see United States vs. Western Pacific Railroad Co., 352 U.S. 59, footnote 17 at page 74.

The foregoing is a true statement of the payment and audit policies of the General Accounting Office to the best of my knowledge and belief.

/s/ HILLIS K. WILSON,
Chief, Freight Subdivision, Transportation Division, General Accounting Office.

Subscribed and sworn to before me this 20th day of April, 1959.

[Seal] /s/ CASSIE L. WOLFE.
My Commission Expires November 30, 1960.

[Endorsed]: Filed May 6, 1959.

[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 8, 1959

Present: Hon. Harry C. Westover, District Judge.

Proceedings: For hearing motion of plaintiff for

reconsideration by the Court of the ruling contained in its opinion, filed April 24, 1959.

Court orders motion denied.

JOHN A. CHILDRESS,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this case on May 4, 1959.

Dated this 1st day of July, 1959.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney, Chief,
Civil Division;

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney; Attorneys for Plaintiff, United States of America.

[Endorsed]: Filed July 1, 1959.

In the United States District Court, Souhern District of California, Central Division

No. 313-58—HW Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN A. PIXLEY, et al.,

Defendants.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
LAUGHLIN E. WATERS,
United States Attorney; by
JORDON A. DREIFUS,
Assistant United States Attorney.

For the Defendant:
F. W. TURCOTTE, ESQ.

Monday, June 8, 1959—10:00 A.M.

The Clerk: No. 2, 313-58, United States vs. Melvin A. Pixley, et al., hearing motion of plaintiff for reconsideration by the court of the ruling contained in its opinion, filed April 24, 1959.

Mr. Dreifus: Ready, your Honor.

Mr. Turcotte: Ready for the defendant.

The Court: Counsel, you seem to misapprehend

my conclusions in this case. There is nothing before the court to indicate at any time at all the defendants came under the jurisdiction of the federal authorities. All we have here is interstate commerce. If there is anything outside of interstate commerce, I don't know anything about it.

They have never filed any schedule with the federal authorities. They never were involved with the federal authorities in any way. Purely a State case.

If there is anything in the record other than that, I would like to know what it is.

Mr. Dreifus: If it please the court, the court's opinion in disposing of the case stated that it was dismissed for lack of jurisdiction.

The Court: That's right, because they have never come within the purview of the federal court.

Mr. Dreifus: I would like to point out to your Honor in our motion for reconsideration we very clearly stated that while there might be other problems in the case, we certainly feel that the United States as a plaintiff can bring a suit within the court's jurisdiction.

I think the court in deciding there was not jurisdiction simply holds that the Public Utilities Code of the State of California somehow limits the jurisdiction of the Federal District Court to entertain a suit by the United States.

The Court: No. You allege in the complaint that the furnishing of such services was subject to the terms of Section 322 of the Transportation Act of 1940, and I have held that it was no subject to that Act at all.

Mr. Dreifus: Then may I take it that your Honor is dismissing the case because our claim stated is erroneous or that our complaint fails to state a claim upon that ground, because we certainly feel our case is within the jurisdiction of the court.

The Court: It is not within the jurisdiction of the court, because if I have jurisdiction I am going to have to hold that it comes within the terms of Section 322 of the Transportation Act of 1940, and I specifically held it does not.

Mr. Dreifus: Then is your Honor also holding that there is no possible way in which we can amend our complaint?

The Court: No. This matter was submitted to the court upon the statement of facts and I rendered a decision upon the statement of facts. If you are not satisfied with my decision, you can go to the Circuit and maybe the Circuit will say that I am wrong. But I can't find where at any time the defendant attempted to bring itself within the jurisdiction of the federal authorities.

Mr. Dreifus: In other words, it is your Honor's decision it must be under the Interstate Commerce Act for the government to be in court.

The Court: Or the Transportation Act.

Mr. Dreifus: The Federal Transportation Act of 1940 as amended, the Interstate Commerce Act.

The Court: That's right. I thought I made that specific. I did go one step further, and probably I shouldn't have gone that step. I said if there is any jurisdiction, it would have to be under the California State Act, but you didn't claim any jurisdiction

under the California State Act, you didn't claim any relief under the California State Act. You only claimed under the Federal Act.

I think the government in its pleadings is held to be accountable as much as a private individual. You come in and plead jurisdiction on a certain statute, and if I can't find you come within that statute, I am going to have to dismiss for want of jurisdiction, am I not?

Mr. Dreifus: But then your Honor is stating that we can't come into court unless we can plead a cause of action under the California statute. Is that the tenor of your Honor's decision?

The Court: No. I said if you have any cause of action, it comes under the California Act. The only theory on which the government can contend that this court has jurisdiction is that you used a government bill of lading. I don't think that is sufficient at all.

I am perfectly satisfied with my opinion in this case. You may not be, but I am.

The Motion is denied.

Certificate

I hereby certify that I am a duly appointed, qualified, and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein,

and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of July, 1959.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed September 21, 1959.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

1. Complaint.
2. Motion & Notice of Motion to dismiss together with proposed findings of fact & conclusions of law & proposed summary judgment.
3. Opposition to defendants' motion to dismiss & for summary judgment.
4. Minutes of the Court for January 12, 1959.
5. Minutes of the Court for January 13, 1959.
6. Answer.

7. Pretrial stipulation of facts & issues.
8. Minutes of the Court for March 2, 1959.
9. Supplemental stipulation of facts.
10. Plaintiff's Memorandum on the issues of (1) statute of limitations, and (2) budren of proof only.
11. Defendants' pretrial brief.
12. Reply Brief of defendants.
13. Opinion.
14. Minutes of the Court for April 24, 1959.
15. Order Denying defendants' motions to dismiss & for summary judgment.
16. Stipulation that the opinion of the Court may be and hereby is the Findings of Fact and Conclusions of law.
17. Notice of entry of judgment.
18. Motion & Notice of motion to reconsider.
19. Judgment.
20. Memorandum of Points and Authorities in Opposition to Motion for Reconsideration.
21. Minutes of the Court for June 8, 1959.
22. Notice of Appeal.
23. Application for extension of time to docket record on appeal.
24. Designation of Record on Appeal.

1 volume of reporter's transcript for June 8, 1959.

Dated: September 23, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy Clerk.

[Endorsed]: No. 16618. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Melvin A. Pixley, d/b/a Furniture Freight Forwarders and/or Furniture Fast Freight, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: September 25, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16618

UNITED STATES OF AMERICA,
Appellant,

vs.

MELVIN A. PIXLEY, d/b/a FURNITURE FREIGHT FORWARDERS and/or FURNITURE FAST FREIGHT, a Corporation,
Appellees.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

1. The District Court erred in holding that it did not have jurisdiction of the claim by the United States to recover overpayments on transportation services performed for it by appellee.

2. The District Court erred in holding that the United States' cause of action to recover overpayments on transportation services performed by appelle was barred by the statute of limitations contained in Section 736 of the California Public Utilities Code.

LAUGHLIN E. WATERS,
United States Attorney;
RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney; Attorneys for Appellant, United States of America.

[Endorsed]: Filed October 8, 1959.

Nos. 16,622 and 16,590

IN THE

United States Court of Appeals

For the Ninth Circuit

CLYDE BATES, *Appellant,* vs. FRED R. DICKSON, Warden, California State Prison at San Quentin, California, *Appellee.*	No. 16,622
MANUEL JOE CHAVEZ, *Appellant,* vs. FRED R. DICKSON, Warden, California State Prison at San Quentin, California, *Appellee.*	No. 16,590

APPELLEE'S BRIEF.

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Cases

Statutes

Nos. 16,622 and 16,590

IN THE

United States Court of Appeals

For the Ninth Circuit

CLYDE BATES, *Appellant,* vs. FRED R. DICKSON, Warden, California State Prison at San Quentin, California, *Appellee.*	No. 16,622
MANUEL JOE CHAVEZ, *Appellant,* vs. FRED R. DICKSON, Warden, California State Prison at San Quentin, California, *Appellee.*	No. 16,590

APPELLEE'S BRIEF.

STATEMENT.

Petitioners Bates and Chavez, along with one Manuel Hernandez, were jointly tried, charged and convicted of six counts of murder in the first degree and punishment for Bates and Chavez was fixed at death. Hernandez was sentenced to life imprisonment.

Likewise, the three defendants were charged, tried and convicted of arson, a violation of § 448a of the California Penal Code. In brief, the defendants were accused of having participated in an argument and fight in the Mecca Bar and threatened to get even. They left the bar, obtained gasoline, threw the gasoline through the front door of the bar and ignited it. As a result, five persons were killed by carbon monoxide and the sixth death was caused by asphyxiation and burns.

The appeals of Bates and Chavez were automatically before the California Supreme Court under California practice. A separate notice of appeal was filed by Hernandez and the California Supreme Court disposed of all three cases in *People v. Chavez,* 50 Cal.2d 778. The United States Supreme Court denied the petition for writ of certiorari. *Chavez v. California,* 358 U.S. 946; *Bates v. California,* 359 U.S. 993.

On August 3, 1959, appellant filed a petition for writ of habeas corpus in the U. S. District Court; the District Court issued an order to show cause on August 5, 1959, returnable August 7, 1959. Appellee filed a return to the order to show cause, together with points and authorities, on August 7, 1959. At the time of the hearing on the order to show cause appellee pursuant to the case of *Brown v. Allen,* 344 U.S. 443, lodged with the District Court a copy of the Clerk's Transcript and Reporter's Transcript of the murder trial of Bates and Chavez.

There is nothing in the record which indicates petitioners filed a traverse to the return and appellee

has no specific recollection of the matter; however, it has long been the custom for appellee to stipulate that the petition can be deemed the traverse to the return and appellee is willing to stipulate that the petition may be deemed a traverse for the purposes of this appeal.

On August 7, 1959, the U. S. District Court entered an order denying the petition for writ of habeas corpus. On that same date a notice of appeal was filed and the District Court issued a certificate of probable cause.

APPELLANTS' CONTENTIONS.

1. The District Court erred in refusing to examine the state court record before ruling; the District Court should have called for the exhibits and the District Court should have taken additional evidence on the allegations concerning the alleged inaccuracy of the statements used against appellants.

2. California's construction of the word "arson" resulted in a denial of appellants' constitutional rights; such construction rendered the section *ex post facto* and in violation of due process and resulted in appellants being convicted upon a charge not made.

3. The accumulation of errors in the introduction of evidence, in the argument to the jury, and in the comments by the trial judge resulted in a trial so unfair that it violated due process.

SUMMARY OF APPELLEE'S ARGUMENT.

I. The District Court may properly rely upon the opinion of the California Supreme Court as a part of the record and need not review the complete record of the state proceedings.

II. Appellants were charged with the crime of murder; neither the statute defining murder nor the counts in the indictment referred to "arson"; the interpretation of the word "arson" in the California statute dividing murder into degrees is a question of state law and involves no federal question.

III. The proceeding in the state court afforded appellants due process; none of the alleged "errors" cited by appellants involve a substantial federal question.

A. The introduction of the statements of the two co-defendants involves no substantial federal question.

B. The allegations concerning the introduction of inflammatory photographs and the alleged misconduct of the prosecuting counsel present no substantial federal question.

ARGUMENT.

I.

THE DISTRICT COURT MAY PROPERLY RELY UPON THE OPINION OF THE CALIFORNIA SUPREME COURT AS A PART OF THE RECORD AND NEED NOT REVIEW THE COMPLETE RECORD OF THE STATE PROCEEDINGS.

The appellants rely upon various language from the case of *Brown v. Allen,* 344 U.S. 443. They assert

that the District Judge held that the state consideration of the question had foreclosed his own consideration. They further contend that the District Court had the *duty* to review the record and that the cases require that the judge *must* examine the entire state record.

Appellants also place much stress upon the allegation that there was a substantial discrepancy between the tape recordings of a conversation and a transcription of that statement which was introduced in evidence. They further allege that this is a "vital flaw" in the state court record requiring the taking of additional evidence. They further contend that the allegations of misconduct and the erroneous introduction of evidence resulted in a proceeding that contained a "vital flaw", thus requiring an examination of the proceeding beyond the record.

At the time of the order to show cause the appellee lodged with the court the reporter's transcript and the clerk's transcript which was used by the California Supreme Court in the automatic appeal. The opinion in the case of the appellants herein is reported as *People v. Chavez,* 50 Cal.2d 778. The District Judge during the argument exhibited complete familiarity with the California Supreme Court decision. However, there is no dispute that he rendered his decision at the end of the argument and without having had an opportunity to examine the transcripts filed with him.

In so ruling, the District Court, however, did not foreclose an inquiry, but simply determined that there

was no question raised which required him to go beyond the opinion of the California Supreme Court, since the petition itself did not raise a substantial federal question. The court in this circumstance was not required to look beyond the opinion of the California Supreme Court.

The District Court was not required to go beyond the opinion of the California Supreme Court in the circumstances of the present case. Appellants' contention that the District Court *must* go beyond the opinion of the state court is not supported by the cases cited. The rule sought by appellants is inflexible and impracticable. Such a rule is not fitted to the requirement that the writ should be summarily heard and disposed of as law and justice require. See 28 U.S.C. 2243.

Contrary to appellants' contention the District Court did not consider itself foreclosed from determining the questions presented. It is clear from the proceedings held in the District Court that the District Court did not consider itself foreclosed. The District Court determined that the allegations of the petition failed to state a substantial federal question. The District Court was not required to go beyond the opinion of the California Supreme Court for this very reason. As indicated by the subsequent discussion, the allegations contained in the petition for the writ failed to raise substantial federal questions.

The allegation in the petition concerning the *"ex post facto"* construction of the word "arson" in the California statutes presents no question involving a

dispute as to the facts. The petition points out no facts different from or not contained in the opinion of the California Supreme Court which bear upon the construction of the statute. All parties to this proceeding concede, and there is no dispute, that the appellants were charged with murder and with a violation of section 448a of the California Penal Code. There is no dispute that this is the first Supreme Court decision in California which discusses section 189 of the Penal Code in reference to the word "arson" and section 448a of the Penal Code. Appellee has contended and does contend that this is purely a question of state law. Appellants contend that the construction of this statute by the California Supreme Court involves their federal constitutional rights. In any event, there can be no dispute but that this question can be resolved upon the facts set out in the opinion of the California Supreme Court. It is clear that the District Court was not required to go beyond the opinion of the California Supreme Court.

The other allegations of the petition are concerned with the introduction of certain statements against the defendants, misconduct of the District Attorney and the judge and the alleged erroneous introduction of photographs. These questions do not involve a substantial federal question as indicated by the subsequent discussion. The District Judge thus properly denied the petition without proceeding to read the entire record of the state proceedings.

There is no contention by appellants that the facts set out in the opinion of the California Supreme

Court differ from the record other than in one instance. They do contend that the tape recording of the statements used in the state court were substantially different than the transcription which was introduced in evidence. However, as it is noted subsequently, the appellants do not allege that this question was raised in the state Supreme Court. They simply allege that the question was raised at the time of trial. Indeed, it is apparent that they cannot allege that the question was raised in the state Supreme Court. The question is thus not discussed in the opinion of the California Supreme Court. This question was thus not properly before the District Court. See 28 U.S.C. 2254, and the subsequent discussion under heading III of this brief.

The contention that the District Court *must* review the entire record and that such is the *duty* of the court is based upon a misinterpretation of the cases. Appellants place great reliance upon the case of *Brown v. Allen,* 344 U.S. 443. That opinion, however, was concerned with the question of whether or not the District Court erred in refusing a writ on the basis of an examination of the record in the state and federal courts instead of holding a *"de novo"* trial on the federal constitutional issues. See *Brown v. Allen, supra,* at 460.

That decision was concerned with the question of whether the District Court could deny the writ after reviewing the state record or whether it had to retry the federal questions. That decision holds only that the District Court could properly rely upon the state

record and is not required to hold a hearing. Furthermore, that decision does not hold or require that the District Court review the entire record in the state proceedings. It holds only that the court *may,* rather than that the court *must,* review the record in the state proceedings.

The decision emphasizes the necessity for "flexibility" and notes that it would be "unduly rigid" to call for the state record in every case. *Brown v. Allen, supra,* at 503-504.

Indeed, neither the opinion of *Brown v. Allen* nor any other opinion holds that the opinion of the State Supreme Court is not a part of the state court record.

The case of *U. S. ex rel. DeVita v. McCorkle,* 216 Fed.2d 743 (3rd Cir. 1954) presents a far different situation than the present case. In that case the state prisoner under death sentence applied for a writ of habeas corpus the day before the time and place of execution were to be announced. The District Judge apparently felt that he had to dispose of the case immediately. The Court of Appeals asserted that the District Judge felt himself circumscribed by the time element. It is thus obvious that the District Court limited his review to the opinion of the state Supreme Court as a result of what he deemed to be the pressure of time. This situation is not present in the instant case. The date of execution was scheduled for more than one week after the date set for the filing of the return to the order to show cause. It is thus apparent that the District Judge did not believe himself, and was not, circumscribed by time. Indeed,

the District Court made it perfectly plain that his refusal to review the complete record in this case was based on the ground that he believed there was no substantial federal question presented.

It should be noted that the court in *Rogers v. Richmond,* 252 Fed.2d 807 (2nd Cir.), cert. den. 357 U.S. 220, declared that it was improper for a District Judge to hold a hearing *de novo* without examining the state record and finding a "vital flaw" or "unusual circumstances".

The appellants attempt to bring themselves within the language of *Brown v. Allen,* 344 U.S. 443, which states that the District Court may rely upon the determinations of a factual issue by the state courts in the absence of a "vital flaw" in the manner in which the question was determined in the state court. In addition to the allegation that the discrepancy between the tape recording and the transcription of the recording which was introduced in evidence was a vital flaw, appellants contend as follows: "That the alleged cumulative error resulted in a vital flaw." Appellants contend that the use of the gruesome photographs and the alleged misconduct of the trial judge was a "vital flaw in the process of ascertaining the facts so that federal intervention was called for."

Appellants have apparently confused the vital flaw doctrine of *Brown v. Allen* with the due process concept itself. The gist of the contention is simply that these "errors" were such that appellants were denied a fair trial within the meaning of the due process clause. If appellants are contending that these fac-

tors constituted a "vital flaw" requiring the court to hold a trial *de novo,* it is difficult to ascertain what evidence beyond the record would be, or could be, called for by the District Judge. Indeed, if an allegation that cumulative errors raise a substantial federal question requiring a trial *de novo,* nearly every state appellate decision would be required to be reviewed by the District Court by the taking of additional evidence on the question of prejudice. The very statement of the proposition discloses the flaw in this reasoning.

Indeed, the question of what constitutes the record and whether or not the District Court is required to review the complete record appears to be an open question in view of the fact that there are no U. S. Supreme Court decisions on this subject. This court should set forth a rule which is both flexible and practicable. It should leave much discretion in the District Court as to whether or not it need call for anything beyond the opinion of the state appellate court. As this court is aware, most murder cases involve lengthy transcripts. The rigid requirement that the District Court must review the entire state record before passing on a petition for writ of habeas corpus would result in an automatic stay in every state death penalty case. This would be so because the filing of such petitions on the eve of execution is not an uncommon practice in these cases. It would be physically impossible for the District Judge to review the entire transcript prior to execution in the all too typical last minute application.

II.

APPELLANTS WERE CHARGED WITH THE CRIME OF MURDER; NEITHER THE STATUTE DEFINING MURDER NOR THE COUNTS IN THE INDICTMENT REFERRED TO "ARSON"; THE INTERPRETATION OF THE WORD "ARSON" IN THE CALIFORNIA STATUTE DIVIDING MURDER INTO DEGREES IS A QUESTION OF STATE LAW AND INVOLVES NO FEDERAL QUESTION.

Appellants contend that the interpretation of California Penal Code section 189 defining murder in the first degree is unconstitutional. They contend that the term "arson" as used in that section as interpreted by the California Supreme Court is erroneous and not in accord with the established California law. Appellants attempt to find a federal question by asserting that such an erroneous interpretation of the California law is *ex post facto.* They also assert that the statute is unconstitutionally vague and that the interpretation of the statute by the California Supreme Court resulted in appellants' convictions on a charge not made.

It should be noted at the outset that the six counts of the indictment, which are pages 1 through 6 of the clerk's transcript lodged with the District Court, do not use the word "arson." All six counts of the indictment charge a violation of § 187 of the California Penal Code and specify only that the appellants wilfully, unlawfully and feloniously killed the named persons, human beings, with malice aforethought. The indictment does not charge the degree of the crime and makes no reference to either arson, torture or premeditation. An additional count of arson, a vio-

lation of section 448a of the California Penal Code, is charged. Indeed, the short form of pleading in California was adopted with the view in mind that a copy of the transcript of testimony taken before the Grand Jury would be a better guide to the charge for which a defendant was being held and tried than detailed pleadings. Under California law a copy of said Grand Jury transcript must be delivered to the defendant or his attorney. (Section 938.1, Calif. Penal Code.)

Section 189 of the California Penal Code divides murder into degrees. That section provides as follows:

> "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

The interpretation of the term "arson" as it is used in section 189 of the California Penal Code is purely and simply a question of state law. Compare *Duffy v. Wells,* 201 Fed.2d 503. Of course this interpretation placed by the California Supreme Court on the term "arson" not only is, but has always been, the law of the State of California and therefore there is no question as to the *ex post facto* nature of the statute.

Furthermore, it should be noted that the California Supreme Court's interpretation of the word "arson"

is entirely consistent with the existing California law. Indeed, the California Supreme Court in 1947 in the case of *In re Bramble,* 31 Cal.2d 43, held that the term "arson" in California includes those acts enumerated in section 448a of the Penal Code. It should be apparent from the reading of the California Supreme Court's decision in *People v. Chavez,* 50 Cal.2d 778, at 787-788, that the interpretation of the word "arson" to include both violation of sections 447a and 448a of the California Penal Code was no "abrupt shift" in interpretation as contended by appellants.

Appellee has no argument with the general principle of law that a criminal statute must contain ascertainable standards of guilt. However, the code sections defining murder are not vague. Neither section 187 of the California Penal Code defining murder nor section 189 of the California Penal Code which divides murder into degrees is vague. The word "arson", as indicated above, has been previously clearly defined by the California Supreme Court to include a violation of section 448a. See *In re Bramble,* 31 Cal.2d 43.

Furthermore, there is no possible comparison between the cases cited by the appellants and this case. *U. S. v. Cohen Grocery,* 255 U.S. 81, involved the violation of a statute making it unlawful for any person to wilfully make any "unjust or unreasonable rate or charge" in handling or dealing in any necessity. The present statute by comparison provides "all murder . . . which is committed in the perpetration or attempt to perpetrate arson . . . is murder in

the first degree." The definition of murder in the first degree is clearly sufficient to enable one to ascertain the degree of their guilt. It should be noted that murder is defined by section 187 of the Penal Code of California in common law terms "murder is the unlawful killing of a human being, with malice aforethought." Certainly the conduct defined by these statutes is fairly ascertainable in contrast with the *Cohen Grocery* case which prohibits "unreasonable prices".

The case of *Winters v. New York,* 333 U.S. 507, at 518-519, involved a statute prohibiting the collection of stories "so massed as to become vehicles for inciting violent and depraved crimes against the person . . . not necessarily . . . sexual passion." It is clear that the specifications of publications prohibited were vague. No analogy can be drawn to the definition of murder and the division of murder into degrees as set out in sections 187-189 of the California Penal Code. The other cases cited by appellants involve statutes which are extreme examples of uncertainty and vagueness.

Likewise, the case of *Cole v. Arkansas,* 333 U.S. 196, is not applicable in the present situation. That case involved affirmance of a judgment on a count which was not charged in the original indictment or information. In the present case the defendants were clearly charged with six murders and the California Appellate Court affirmed those six counts of murder. Appellants were thus clearly notified of the charges against them in contrast to the *Cole* case

where the appellate court affirmed the judgment based on a count not charged.

Appellants attempt to bring themselves within the doctrine of the *Cole* case by urging that the interpretation of the instructions to the jury which used the term "arson" in setting out the degree of murder as charged in the indictment has resulted in appellants being convicted upon a charge not made. It is clear that this argument is identical to the argument that the California Supreme Court's interpretation was *ex post facto*. This contention, of course, has been discussed above. It is apparent that the *Cole* case does not aid appellants, because appellants were charged with murder. They were charged with a violation of section 187 of the California Penal Code which uses the common law definition of murder.

Appellants assert in their briefs that the verdicts could not be supported upon the theory that the murder was perpetrated by means of torture and thus first degree murder under California law. They assert that the indictment did not charge murder by torture. This is quite correct; as indicated heretofore, the indictment also did not charge murder committed in the perpetration of arson. Indeed, as indicated above, under California law the indictment simply charged appellants with violation of section 187 of the California Penal Code—murder. The indictment made no reference and, under California law, need make no reference to the degree.

The jury was instructed on both murder committed in the perpetration of arson and murder committed

by torture. Indeed, in *People v. Chavez,* 50 Cal.2d 778 at 788, the court found that the trial court was justified in giving the instruction regarding murder committed by torture and the evidence was sufficient to support a finding by the jury to that effect. The evidence of torture alone was sufficient to sustain the verdict.

III.

THE PROCEEDINGS IN THE STATE COURT AFFORDED APPELLANTS DUE PROCESS; NONE OF THE ALLEGED "ERRORS" CITED BY APPELLANTS INVOLVE A SUBSTANTIAL FEDERAL QUESTION.

A. The Introduction of the Statements of the Two Co-defendants Involves No Substantial Federal Question.

Appellants complain of statements of co-defendants introduced at the trial. It should be pointed out that as to the statements here involved the trial court instructed the jury not to consider either of them in reference to Chavez. Likewise, the court instructed that the statement of Hernandez was admitted solely as to Hernandez and should not be used in any way with reference to Bates. As the California Supreme Court pointed out, a portion of the statement of Brenhaug should not have been admitted as to Bates. Both statements were admissible in reference to Hernandez. See *People v. Chavez,* 50 Cal.2d 778, 790-791.

It appears that as to Chavez the introduction of the statements clearly presents no federal question. These statements were admitted under common law rules of long standing. They were admitted solely against a

co-defendant with express instructions to the jury to consider them only in reference to the co-defendant. The introduction of such statements with limiting instructions under the long standing common law rules certainly is not contrary to the "Anglo-American concept of ordered liberty" or to basic "fairness" of the trial. The same rule is applicable in Federal courts. As to Bates, it is clear that at most one portion of one of the statements should not have been admitted. However, that statement was the statement of Brenhaug and since Brenhaug also testified to these facts on the stand and was subjected to cross-examination, no question of lack of essential fairness exists. These contentions present no substantial federal questions.

Appellants allege that the transcribed statements of Hernandez and Brenhaug were not accurate representations of the recorded conversations. Presumably these contentions were tried out before the trial judge and found to be without substance. Furthermore, it should be noted that although appellants' trial counsel in the state courts made this contention, no such contention was made and none is alleged to have been made in the California Supreme Court. It has been the long established law that habeas corpus should not be used as a substitute for an appeal. The failure to raise this question in the state Supreme Court has resulted in a waiver. To put it in other terms, the failure of the appellants to raise this question in the California Supreme Court as required by California law has resulted in a failure to exhaust

state remedies within the meaning of 28 U.S.C. 2254. See *Brown v. Allen,* 344 U.S. 443, at 483, 505; also see *Irvine v. Dowd,* 359 U.S. 394.

B. The Allegations Concerning the Introduction of Inflammatory Photographs and the Alleged Misconduct of the Prosecutor Present No Substantial Federal Questions.

Appellants complain about the introduction of alleged inflammatory photographs and certain arguments of the prosecutor. California follows the general rule that photographs should be excluded where their principal effect would be to inflame the jurors. However, if they have a probative value with respect to a fact at issue which outweighs their inflammatory nature, they are admissible. The determination of this question is left to the discretion of the trial court as he is the one best able to make this determination. It should be noted that the photographs which were objected to were relevant to the cause of death, to the origin of the fire and to the "torture" of the victims. These allegations, as well as the allegations concerning the alleged misconduct of the prosecutor, present questions of ordinary procedure and practice which are subject to regulation by the state courts and do not present a federal question.

Furthermore, the allegation to the effect that the trial judge made an improper statement to the effect that the defendants were in fact guilty of arson is a misinterpretation of the judge's remark. It is clear from a reading of the transcript and a review of the opinion of the California Supreme Court (50 Cal.2d 778 at 793) that the trial judge was simply referring

to the legal question of whether or not violation of section 448a was "arson." It is clear from the conversation that he did not intend to take the factual question from the jury. A review of the alleged misconduct by the prosecution and the trial judge is set out in the opinion (50 Cal.2d 778 at 792-793) and the appellee's position in that regard need not be repeated here.

CONCLUSION.

It is respectfully submitted that the order of the District Court should be affirmed.

Dated, San Francisco, California,
March 17, 1960.

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Appellee.

No. 16632

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EZEQUIAL FRANK LOPEZ VASQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

No. 16632

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EZEQUIAL FRANK LOPEZ VASQUEZ,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

An Indictment was presented and filed on March 4, 1959, by the Federal Grand Jury for the Southern Division of the Southern District of California while sitting at San Diego, charging Appellant and another in one count with a violation of Title 21, United States Code, Section 176(a), occurring on or about February 5, 1959, in the Imperial County, within said Division and District. [C. T. 2.][1]

Jurisdiction of the District Court is found in Section 3231 of Title 18, United States Code. Thereafter judgment of conviction of Appellant upon his plea of guilty was entered on May 26, 1959, and on June 4, 1959, Appellant filed notice of appeal from the judgment of conviction. [C. T. 35.] This Court has jurisdiction of the

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[1]"C. T." refers to Clerk's Transcript of Record.

cause under the provisions of Sections 1291 and 1294 of Title 28, United States Code, and Rules 37(a)(2) and 39 of the Federal Rules of Criminal Procedure.

II.

Statement of Facts.

Appellant and his codefendant Jose Quinones Hernandez were arraigned on March 16, 1959, on the Indictment which charged concealment of marihuana after illegal importation. [C. T. 3.] An attorney was appointed for Appellant and a plea of not guilty was entered thereafter by Appellant, as well as by his codefendant, on the date of arraignment. [C. T. 3.] On March 24, 1959, Appellant, on motion of his counsel, changed his plea to guilty and at the same time the case was set for jury trial on April 21, 1959, as to his codefendant. [C. T. 5; R. T. 2.][2] The pertinent proceedings on the change of plea are as follows:

> "Mr. Leeger: As to Mr. Vasquez, your Honor, we would like to move to withdraw our plea of Not Guilty for the purpose of entering a new plea . . .
>
> The Court: How old are you, Vasquez?
>
> Defendant Vasquez: 21.
>
> The Court: Is that what you would like to do, withdraw your plea of Not Guilty and change your plea to that of guilty? Is that what you want to do?
>
> Defendant Vasquez: Yes, sir.
>
> The Court: Is that free and voluntary on your part?
>
> Defendant Vasquez: It is free and voluntary on my part.

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[2]"R. T." refers to Reporter's Transcript of Proceedings.

The Court: Is that you feel that you want to change your plea because you are guilty or for some other reason?

Defendant Vasquez: Well, because I am guilty, your Honor.

Mr. Leeger: You understand what you are charged with here; right?

Defendant Vasquez: I understand.

The Court: You understand this is a charge that under the law the punishment provided is not less than five years? You understand that?

Defendant Vasquez: (Affirmative nod.)

The Court: The Court must impose a minimum sentence. Is that the—

Mr. Leeger: Well, no, your Honor. I understand that being under 22 this man has—your Honor has the option of treating him as a youth offender. Am I correct in that?

The Court: Wait a minute. Let me see. This is concealment, illegal concealment of marihuana. Is that the one?

Mr. Leeger: Yes.

The Court: After illegal importation. Title 21, U. S. C. 176(a).

Mr. Hughes: That carries mandatory penalties, however, your Honor. The defendant is under 22 years of age. If the Court elects he may be treated as a youth offender.

The Court: Yes, that is correct. However, that is what the law provides. But the situation is as counsel has stated. I am not committing myself as to just what will be done.

Mr. Leeger: I realize that, your Honor. I wanted to make sure I had not misinterpreted the law. I realize this is within your discretion. You understand too, Mr. Vasquez?

Defendant Vasquez: I understand.

The Court: There is a privision of the law that people of a certain age, as in the age of this young man, may have consideration of the Court as youth offenders. That is correct, isn't it Mr. Hughes?

Mr. Hughes: Yes, your Honor, that is true.

The Court: But, as I say, I am not making any commitment. I never commit myself as to what I will do.

Mr. Leeger: I realize that. We are not asking you to commit yourself at this time, your Honor.

The Court: Has anyone made you any promise or any representation that if you would plead Guilty, the Court would give you consideration for that reason?

Defendant Vasquez: No, sir.

The Court: You may proceed with the change of plea."

The indictment was then read to Appellant and he pleaded guilty.

Thereafter, a jury trial was commenced on April 28, 1959, as to the codefendant Hernandez. [C. T. 11.] On April 29, 1959, after a jury had been called and impaneled, a motion was made in behalf of said codefendant to suppress evidence which was denied. [C. T. 13.] Appellant testified for the codefendant at the hearing of said motion on April 29, 1959 [C. T. 13], and at the

trial on April 30, 1959 [C. T. 15], which concluded in a verdict of guilty as to the codefendant on May 1, 1959. [C. T. 16.] Appellant was represented by his counsel who was present at the time of his respective pleas and during portions of the subsequent proceedings when Appellant testified for codefendant. [C. T. 30.]

On May 13, 1959, twelve days after the verdict as to the codefendant, the motion to vacate the plea of guilty as to Appellant was filed. [C. T. 19.] Appellant stated in an affidavit filed May 21, 1959, in support of motion to vacate entry of plea of guilty that "his recollection of the events in connection with said search and seizure were confused and unclear," because he was "extremely nervous, upset and confused" at the time of the alleged illegal search and seizure and he concluded that he "therefore was not able to provide his attorney with an accurate picture of said events." [C. T. 24.] Affiant continued that it was not until "he was informed of testimony offered at the trial of his codefendant, Jose Quinones Hernandez, that various important phases of said search and seizure reoccurred to him, and it was not until after that his attorney was informed of these facts"; and further concluded that because his attorney did not receive a clear picture of these facts his attorney was unable to adequately advise him and represent him in this matter. [C. T. 24.]

Said motion to vacate plea of guilty was denied on May 22, 1959. [C. T. 33; R. T. 7.]

The Trial Court found at that time as follows: "The defendant arraigned was represented by competent counsel, and the facts show that *he not only pleaded guilty*

voluntarily but that he testified as to such guilt on two occasions with the knowledge of his counsel, and that both counsel and defendant were under no misapprehension as to the facts of the seizure of the evidence herein." [R. T. 7.] (Emphasis added.)

Thereafter the defendant was sentenced to imprisonment for a period of five years. [C. T. 33; R. T. 24.]

III.

Specification of Error.

The Appellant has in effect specified one error: That the Court erred in denying his motion to vacate his plea of guilty.

IV.

Statutes Involved.

Section 176(a) of Title 21 of the United States Code provides in pertinent part as follows:

> ". . . whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years . . ."

Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> "The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining

that the plea is made voluntarily with understanding of the nature of the charge."

Rule 32(d) of Federal Rules of Criminal Procedure provides as follows:

"A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Rule 41(e) of Federal Rules of Criminal Procedure provides in pertinent part as follows:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized from the return of the property and to suppress for use as evidence anything so obtained . . . The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

V.
ARGUMENT.

A. The Action of the District Court in Denying the Motion to Vacate the Plea of Guilty Did Not Constitute an Abuse of Discretion Under the Circumstances of This Case.

At the outset it should be noted that the cases hold that the denial of a motion to withdraw a plea of guilty, whether made before or after sentence, is reversible only if it appears there has been an abuse of discretion.

United States v. Lester, 247 F. 2d 496, 500 (2nd Cir. 1957);

Richardson v. United States, 217 F. 2d 696, 699 (8th Cir. 1954);

Friedman v. United States, 200 F. 2d 690 (8th Cir. 1952), cert. den. 345 U. S. 926; reh. den. 345 U. S. 961.

The cases cited by Appellant appear to be primarily concerned with whether or not the circumstances under which a plea of guilty was entered, particularly where counsel was waived, disclosed that such a plea was made voluntarily with understanding of the nature of the charge as required by Federal Rule 11. Here, however, we have a case in which the sole purpose of the motion to vacate the plea is to assert a belated motion to suppress evidence after the proposed movant had testified voluntarily of his guilt at prior proceedings in behalf of his codefendant.

The motion was made with the following undisputed factual background:

First, Appellant was represented by counsel at every stage of the proceedings. Second, his initial plea of not

guilty was changed on Appellant's motion at the time the matter was due to be set for trial as to himself and the other party charged in the indictment. Third, the Appellant raised by his motion to vacate his plea an issue not of his innocence of the charge, but an issue of whether he should be allowed to attempt to prevent by further proceedings certain evidence from being admitted against him. Had Appellant allowed his initial plea of not guilty to stand, he would have had to raise such an issue prior to, or certainly during, the trial which occurred twelve days prior to the time he subsequently made the motion to vacate his plea of guilty. See Rule 41(e), *supra.*

Turning to the cases cited by Appellant in his Brief, it is respectfully submitted that each of these authorities is easily distinguished from the facts involved in the instant appeal.

United States v. Lester, supra, primarily relied upon by Appellant, was a case where a plea of guilty had been made without counsel and a motion to vacate the plea had been denied by the District Court. The Court of Appeals held the Court had failed to ascertain whether the guilty plea was made with full understanding of likely consequences. The sole purpose of the remand to the District Court was to have said court determine whether defendant pleaded guilty reasonably relying on representations made by a prosecutor that a prison sentence would not be imposed. The Court further pointed out that the failure of the District Court to conduct a penetrating and comprehensive examination of all circumstances did not constitute reversible error absent a showing that defendant had been misled by the government.

The two cases quoted by Appellant in this case, *Von Moltke v. Gillies,* 332 U. S. 708 (1947), and *Smith v.*

United States, 238 F. 2d 925 (5th Cir. 1956), concerned cases in which the defendant was not represented by counsel at the time the plea of guilty was entered.

Von Moltke v. Gillies, supra, involved a plea of guilty entered to a conspiracy to violate the Espionage Act. The Supreme Court remanded the case to the District Court to hold hearings and make findings on the question of whether petitioner pleaded guilty in reliance of erroneous legal advice of a government agent, and to release her from further custody under the plea if said court found that petitioner did not completely, intelligently and with full understanding of the implications, waive her constitutional right to counsel.

Smith v. United States, supra, involved a defendant who had waived counsel and indictment and was sentenced to thirty years imprisonment on a plea of guilty. The Court of Appeals held that the evidence on the hearing under Section 2255 of Title 28, United States Code, required a finding of denial of due process.

Bergen v. United States, 145 F. 2d 181 (8th Cir. 1944), concerned a motion to withdraw plea of guilty which had been entered to a complex conspiracy case. The Court seems to emphasize the fact that the plea was made without counsel, and acknowledges that the motion was within the discretion of the District Court. It should be noted that here defendant took his initial course on his own initiative and the request to withdraw his plea appears to have been made after consultation with counsel. The Court indicated that the question there to be considered was whether at the time of the entry of his plea defendant had the requisite understanding of the charges against him and held that under the facts he did not.

Kercheval v. United States, 274 U. S. 220 (1927), decided that a plea of guilty withdrawn by leave of Court was not admissible on the trial of the issue arising on the substituted plea of not guilty. The statement of court cited by Appellant was made in connection with the particular issue of admissible evidence involved there which did not concern whether or not the plea of guilty should have been withdrawn.

McJordan v. Huff, 133 F. 2d 408 (D. C. 1943), refers to a possible change of plea at time of arraignment, as a matter of course, but held that the appointment of counsel after arraignment but before sentence did not infringe on petitioner's constitutional rights and denied petition for writ of habeas corpus.

It would appear on the face of the record from Appellant's subsequent voluntary testimony of his guilt that by his initial plea of not guilty all other possible defenses were fully considered by the time he charted his course by changing his plea of guilty when the case was due to be set for trial. The affidavit of Appellant is not explicit as to which facts reoccurred to him and as to what facts he claims were not initially disclosed to his counsel. Certainly the facts surrounding the charge would have been fresher in Appellant's mind during the time the plea to the charge was considered than at any subsequent date. The entire circumstances fully support the finding placing no credence in Appellant's claim that he pleaded guilty under a misapprehension of his rights or because he was confused as to any facts.

The facts assumed by Appellant of an illegal search and seizure pose the same question decided by the case of *United States v. Sturm*, 180 F. 2d 413 (7th Cir. 1950), cert. den. 70 S. Ct. 1008, which was properly considered by the District Court as being applicable to this case.

The argument that an alleged illegal search and seizure, being a violation of a right guaranteed by the Constitution, vitiated a plea of guilty, was made in that case.

There the facts, admitted *arguendo,* showed an arrest and search and seizure by Federal agents of certain property in defendant's room. Following this arrest and shortly after arraignment by a United States Commissioner, the defendant in that case procured the services of an attorney who represented him throughout all the subsequent proceedings. In these later proceedings, the defendant waived Indictment, consented to disposition of the case in the district of apprehension and pleaded guilty to three Informations charging Federal offense. He thereafter moved the District Court to vacate the sentences, claiming that the arrest was illegal and the guaranty against reasonable searches and seizures was violated.

The Court of Appeals, in affirming the District Court, pointed out that the contention of defendant that this alleged violation of his constitutional right automatically deprived the Court of jurisdiction to receive his plea of guilty could not be maintained because there was no causal relationship to his conviction, in that defendant had entered a plea of guilty and the evidence obtained was not used against him.

Referring to the contention of defendant that, "although a plea of guilty ordinarily constitutes an admission of guilt and waiver of trial and the rights incidental thereto, it does not have this effect if made while the accused is under a misapprehension of the facts and his rights," the Court pointed out that the conclusive answer to this contention was that defendant was represented by counsel throughout the proceedings.

Edwards v. United States, 256 F. 2d 707 (D. C., 1958), points out that even a claim of ineffective assistance of counsel in an effort to impeach a plea of guilty is immaterial except perhaps to the extent it bears on the issues of the voluntariness and understanding with which plea was made. It was further stated in this case that "understandingly" refers to the meaning of the charge, what acts amount to being guilty of the charge and the consequences of pleading guilty thereto, rather than to dilatory or evidentiary defenses.

It is submitted the record here amply supports the finding that the plea of guilty was voluntarily and understandingly made and that the denial of the motion to vacate said plea was not an abuse of discretion requiring reversal of the conviction.

B. The Failure to Allow Oral Argument on the Motion to Vacate Plea of Guilty Did Not Constitute Error.

Appellant has in effect specified as a second point of error the failure to allow any oral argument on the motion to vacate plea of guilty. However, the argument of Appellant on this point is directed to the applicability of the case of *United States v. Sturm, supra,* to the facts of this case, rather than to any showing of error resulting from the trial court's action. Nor does the record show an objection was made that failure to allow oral argument, in addition to the written argument filed by Appellant, was prejudicial error. The pertinent portion of the record at this point is as follows:

> "Mr. Leeger: That is right. I received Mr. Enstrom's brief yesterday morning, and I filed an answering brief yesterday afternoon.

According to the ruling there will be no further argument permitted; is that right, sir?

The Court: Whatever I said is in the record, Mr. Leeger. You heard it, did you not?

Mr. Leeger: Yes, I did.

The Court: That is all I have to say in the matter. I said I don't require any argument.

Mr. Leeger: Very well, sir."

"It is only where an error is seriously prejudicial that it will be noticed in the absence of objection."

Himmelfarb v. United States, 175 F. 2d 924, 950 (9th Cir. 1949), cert. den., 338 U. S. 860.

Rule 52(a) of the Federal Rules of Procedure provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

It is submitted that the failure to allow oral argument in this matter which had been briefed in writing was at the most a variance in procedure which should be disregarded.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of guilty in the Court below should be affirmed.

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No. 16649

United States Court of Appeals

for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

MILDRED MURPHY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Montana.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—1-8-60

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow

No. 49,862

MILDRED MURPHY,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED, a Corporation,

Defendant.

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

I.

That at all times herein mentioned defendant was and is a corporation organized and existing under and by virtue of the laws of the State of Maryland and qualified to do business within the State of Montana, and during the times herein mentioned owned and operated a grocery store at 55 East Granite Street in the City of Butte, Montana.

II.

That on or about the 24th day of June, 1958, plaintiff entered defendant's said store as an invitee for the purpose of purchasing items of groceries held for sale by defendant, and in the exercise of due care, proceeded to walk upon the surface of the floor of said store, and as a result of the careless, reckless and negligent act of defendant,

through its agents and employees as hereinafter alleged, plaintiff was caused to slip and fall, and did slip and fall violently upon the said floor, bruising and injuring plaintiff's head, twisting and wrenching plaintiff's neck, wrenching and injuring plaintiff's cervical and lumbosacral spine; that as a result of such injuries, plaintiff suffers constant severe headaches, constant low back ache, pain in the neck and cervical spine, is extremely nervous and the constant headaches and low back and neck pains make it extremely difficult for her to sleep; that the injuries plaintiff sustained as above set out are permanent in their nature, all to her damages in the amount of Ten Thousand Dollars ($10,000.00).

III.

That by reason of the injuries sustained as aforesaid, plaintiff has been required to incur medical expense in the sum of Four Hundred Dollars ($400.00); that she is receiving medical treatment now and will continue to require medical treatment for an indefinite period, and plaintiff estimates the cost of the future medical treatment which will be required at the sum of Two Thousand Five Hundred Dollars ($2,500.00).

IV.

That plaintiff has for many years last past been employed as a waitress in the City of Butte, Montana; that at the time of the injuries aforesaid, plaintiff was capable of earning, and was earning in wages and tips Seventy Five Dollars ($75.00)

per week as a waitress; that by reason of the premises, plaintiff has been unable to work since the date of said injury, to her damage in the sum of Three Thousand Dollars ($3,000.00); that the injuries sustained are permanent and render the plaintiff utterly incapacitated from carrying on her occupation as a waitress and plaintiff will, by reason of the premises, lose future earnings in the sum of Forty Five Thousand Dollars ($45,000.00).

V.

That defendant was careless, reckless and negligent in that prior to the happening of the injuries herein complained of, defendant, through its agents and employees, placed upon the floor surface of its said store building an excess amount of waxy, oily, slippery substance or material and failed to use reasonable care in applying said waxy, oily, slippery substance or material on the surface of said floor, and failed to use reasonable or ordinary care in the maintenance of said floor after the application of said slippery substance, but allowed said floor to remain in a slippery, hazardous and unsafe condition.

VI.

That the foregoing acts of negligence on the part of the defendant through its agents and employees were the proximate cause of the injuries plaintiff sustained.

Wherefore, plaintiff prays judgment against defendant in the sum of Fifty Nine Thousand Six

Hundred Fifty Dollars ($59,650.00) and for her costs of suit.

Dated this 10th day of December, 1958.

/s/ LEIF ERICKSON,
Attorney for Plaintiff.

State of Montana,
County of Lewis & Clark—ss.

Leif Erickson, being duly sworn on behalf of the plaintiff in the above-entitled action says:

That he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes them to be true; that the said plaintiff is absent from the County of Lewis and Clark where her attorney has his office, and that affiant is plaintiff's attorney and therefore makes this Affidavit.

/s/ LEIF ERICKSON.

Subscribed and sworn to before me this 10th day of December, 1958.

[Seal] /s/ J. R. RICHARDS,
Notary Public for the State of Montana, Residing at Helena, Montana.

My Commission expires: February 27, 1960.

[Endorsed]: Filed January 2, 1959, U.S.D.C.

In the United States District Court for the District of Montana, Butte Division

No. 690

MILDRED MURPHY,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED,

Defendant.

ANSWER

The Defendant, for answer to Plaintiff's Complaint, admits, denies and alleges as follows:

1.

Admits the allegations of paragraph "I" thereof.

2.

Answering the allegations of paragraph "II" thereof, Defendant admits that on June 24, 1958, the Plaintiff entered Defendant's said store apparently to shop for groceries; denies that the Plaintiff was exercising due or ordinary care; admits that the Plaintiff slipped and fell in said store; denies that such falling was the result of any careless, reckless or negligent act or omission of this Defendant; denies having sufficient knowledge or information to form a belief as to the truth of the allegations of the injuries allegedly suffered by Plaintiff in said fall and therefore denies the same;

denies each and every allegation contained in said paragraph not hereinbefore admitted.

3.

Denies having sufficient knowledge or information to form a belief as to the truth of the allegations of paragraphs "III" and "IV" thereof, and therefore denies the same.

4.

Denies the allegations of paragraphs "V" and "VI" thereof.

5.

Denies each and every allegation in Plaintiff's Complaint not hereinbefore admitted.

And Comes Now the Defendant and for a Further and Affirmative Defense to Plaintiff's Complaint, Alleges:

1.

That any injuries sustained or suffered by Plaintiff at the time and place and on the occasion mentioned in her Complaint were caused in whole or in part, or were contributed to, by the negligence or fault or want of care of the Plaintiff in the manner in, and gait at which she walked in Defendant's said store and in her failure to watch where she was going and use ordinary care for her own protection.

Wherefore, the Defendant having fully answered, prays that Plaintiff take nothing by virtue of her

Complaint and that the Defendant have judgment for its costs herein.

/s/ JAMES A. POORE, JR.,

/s/ ROBERT A. POORE,

Attorneys for Defendant, Safeway Stores, Inc., a Corporation.

[Endorsed]: Filed February 10, 1959.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled action, find in favor of the plaintiff and against the defendant, and assess plaintiff's damage at $36,500.00.

Dated this 20th day of April, 1959.

/s/ NEAL J. LEARY,
Foreman.

[Endorsed]: Filed April 20, 1959.

In the United States District Court for the District of Montana, Butte Division

No. 690

MILDRED MURPHY,

Plaintiff,

vs.

SAFEWAY STORES, INC.,

Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury on the 15th day of April, 1959, both parties appearing by counsel and the issues having been duly tried and the jury having rendered a verdict for plaintiff in the sum of Thirty Six Thousand Five Hundred Dollars ($36,500.00),

It Is Hereby Ordered, Adjudged and Decreed that plaintiff recover of defendant the sum of Thirty Six Thousand Five Hundred Dollars ($36,500.00) with interest at the rate of six per cent (6%) per annum from the 20th day of April, 1959, and her costs of action.

Dated this 22nd day of April, 1959.

/s/ W. D. MURRAY,
Judge.

[Endorsed]: Filed and entered April 22, 1959.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT OR FOR NEW TRIAL

Comes now the Defendant, Safeway Stores, Inc., within ten (10) days after the reception of the Verdict in the above-entitled matter, and within ten (10) days after entry of Judgment thereon, and respectfully moves the Court to have said Verdict and the Judgment entered thereon set aside and to have Judgment entered in accordance with Defendant's Motions for Directed Verdict made at the close of the Plaintiff's case in chief and at the close of all the evidence and held under reserved ruling by said Court for the reasons set forth in said Motions.

And, if the foregoing Motion for Judgment not withstanding the Verdict be denied, said Defendant respectfully moves said Court to set aside said Verdict and the Judgment entered thereon and grant said defendant a New Trial upon the following grounds:

1. The Verdict is against the clear weight of the evidence on the issue of Defendant's alleged negligence.

2. The amount of the Verdict is not justified by the evidence and is excessive and predicated upon passion and prejudice.

3. There was substantial error committed at trial in the admission of evidence as to aggravation of a pre-existing injury or ailment contrary to the issues raised by the pleadings and our Defendant's objection; and no amendment of said pleadings having been made and no instruction on the proper damages pertinent to aggravation having been tendered or given although argument was predicated upon the same to the Jury by Plaintiff's counsel.

Respectfully submitted this 27th day of April, 1959.

/s/ JAMES A. POORE, JR.,

/s/ ROBERT A. POORE,

/s/ URBAN L. ROTH,

Attorneys for Defendant.

[Endorsed]: Filed April 27, 1959.

[Title of District Court and Cause.]

ORDER

The defendant's motion for judgment in accordance with motion for directed verdict or for new trial having come on for hearing before the Court on the 8th day of June, 1959, and the matter having been fully argued and submitted to the Court, and the Court having considered all of the arguments, and the briefs submitted, and being fully advised in the premises,

It Is Therefore Ordered and this does order that the defendant's motion for judgment in accordance with motion for directed verdict or for new trial be and the same hereby is denied in its entirety.

Sufficiency of Evidence

By the giving of plaintiff's instruction No. 8 to the effect that the right of the proprietor to wax a floor is not superior to his duty to use care and caution to avoid injury to his patrons, and by the amendment of defendant's Instruction No. 12 by the insertion of the phrase "or the creation of a dangerously slippery condition," so that the instruction read "a store owner * * * may treat his floor with wax * * * unless he is negligent in the materials he uses for such treatment or the manner of applying them or the creation of a dangerously slippery condition * * *," it became apparent the Court was adopting the law announced in the cases of Nicola vs. Pacific Gas & Electric Co., (Cal.) 123 P 2d 529; Cagle vs. Bakersfield Medical Group, (Cal.) 241 P 2d 1013; Baker vs. Mannings, Inc., (Cal.) 265 P 2d 96; and Chase vs. Perry, (Okl.) 326 P 2d 809. Plaintiff's instruction No. 8, and defendant's instruction No. 12, as amended, were given without objection, and thus the law announced in the foregoing cases became the law of this case. The Court is of the opinion that under such law there is sufficient evidence in this case to support the jury's finding of negligence on the part of defendant.

The evidence discloses that the floor in the store had been waxed twice a week for 10 or 12 years, and that it was last waxed the evening before the morning on which plaintiff fell. Both the manager of the store and the janitor testified that the wax had a tendency to build up and accumulate on the floor to the extent that extraordinary steps were required to remove it. In this connection, the janitor testified that prior to the date of Miss Murphy's fall he had never dewaxed the floor, but that since then from time to time "whenever he had some extra time" he would dewax the floor with hot water with lye in it. The manager testified that the excess wax was removed by scraping, and as best he could remember, the scraping off of the excessive buildup of wax had last been done about two months before the accident. There was likewise testimony and a demonstration by the janitor as to how he applied the wax to the floor and spread it with a hand mop. The jury heard and saw this evidence, and could have found negligence in such method of application. It is not necessary, as defendant suggests, for the plaintiff to have proved a better method of waxing, in order for the jury to be warranted in finding that the method used was negligent.

There was also evidence, before mentioned, that for some 10 or 12 years prior to the fall of Miss Murphy the entire floor in the store had been waxed twice a week. The evidence further showed that sometime after the accident the schedule was

changed so that the entire floor was waxed only once a week and wax applied only to worn spots on the second occasion during the week, and that the place where Miss Murphy fell was not one of the places that received the second application in a week after the change was made. Whether such a post-accident change in method of operation can be considered in the ordinary case in determining negligence as of the time of the accident need not be considered here, because in the circumstances of this case, it was proper for the jury to consider. In the first place, evidence of the change was introduced by the defendant in its case and was received without objection. In the second place, during his argument to the jury, counsel for defendant demanded that counsel for plaintiff point out to the jury in what respects defendant had been negligent in maintaining its floor, and in what way it could improve its maintenance of the floor to make it safer for its patrons. Counsel for plaintiff in answer stated in effect that defendant itself had already discovered its negligence and had itself remedied the situation, pointing to the evidence of the change in the number of waxings of the floor per week. This was evidence which the jury could consider.

Plaintiff testified she had been in the store at least several times a week for years prior to the accident, and that she had never seen the floor as shiny as it was on the day she fell. She testified she was wearing medium, rubber heeled shoes in

good condition and was walking in her normal manner at the time she fell. In this connection it was shown by the evidence that plaintiff was at that time, and for some 30 years, had been a waitress, an occupation which requires some considerable degree of adroitness afoot. This was a circumstance the jury might have considered in determining the cause of her fall.

Then there was the evidence of the fall itself. Plaintiff testified that as she was walking along in a normal manner, her feet shot out in front of her, and she landed on her back and the back of her head with considerable violence. This was corroborated by witnesses for the defendant, clerks in the store, who heard the thud of plaintiff striking the floor at considerable distances away from where she fell. As Judge Pope stated in Allen vs. Matson Navigation Company, 255 F 2d 273 at 280:

"Although the mere fact that Mrs. Allen fell would by itself be no evidence as to why she fell, yet the circumstances of how she fell, when considered with the other evidence in the case, has considerable significance. The witness who saw Mrs. Allen fall, as well as Mrs. Allen herself, testified that as Mrs. Allen walked across the landing, both her feet flew straight out in front of her and up into the air while she fell with a thud upon her back. That is at least some evidence that hers was a slipping fall."

Likewise in this case, while the mere fact that Miss Murphy fell would be no evidence of why she

fell, the manner in which she fell has considerable significance, and indicates that hers was a slipping fall.

Counsel for defendant points to the lack of evidence in this case that there was a skid mark on the floor, or that there was after the fall wax on the plaintiff's shoes or clothes, such as is found in some slip and fall cases. However, in those cases such evidence merely tends to establish an accumulation of wax on the floor, and that the plaintiff slipped on such wax, and is but one type of evidence establishing those facts. Here there was other types of evidence from which the jury could infer those facts. There is the evidence of the manager and janitor that the wax tends to build up, that the floor had not been dewaxed for two months prior to the plaintiff's fall; that since the accident the number of waxings of the floor at the point of plaintiff's fall had been reduced, and the manner in which plaintiff fell as indicating a slipping fall.

The question of defendant's negligence was for the jury, and in the Court's view there was ample evidence to support the jury's finding on that question, and its verdict will not be disturbed.

Excessiveness of Damages

There is no dispute in the evidence that plaintiff suffered a severe and violent fall with her two feet shooting out from under her, and she landing heavily on her back and the back of her head. There is likewise no dispute in the evidence that

from the time of the accident, at least up to the time of the trial, she had undergone considerable pain and suffering and had been unable to work. There is a conflict in the medical testimony as to the extent and permanency of plaintiff's injuries, but that conflict was for the jury to resolve. There was competent medical testimony which, if believed by the jury, would have supported a verdict much larger than that returned. The Court cannot say that the amount awarded plaintiff is excessive, or is an indication that it was arrived at under the influence of passion and prejudice.

Evidence of Aggravation of Existing Ailment or Condition

The evidence of the existing arthritic changes in plaintiff's cervical spine was produced by defendant in its case, and plaintiff was entitled to cross-examine with regard to the aggravation of that pre-existing condition. In any event, the allegations of the complaint are broad enough to admit evidence of aggravation of the pre-existing condition, even in plaintiff's case, so there was no error in admitting such evidence under the circumstances here.

Done and dated this 1st day of July, 1959.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and entered July 1, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Safeway Stores, Inc., a Corporation, the Defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 22nd day of April, 1959.

/s/ JAMES A. POORE, JR.,

/s/ ROBERT A. POORE,

/s/ URBAN L. ROTH,

Attorneys for Defendant.

[Endorsed]: Filed July 30, 1959.

In the United States District Court, District of Montana, Butte Division

No. 690

MILDRED MURPHY,

Plaintiff,

vs.

SAFEWAY STORES, INC.,

Defendant.

TRANSCRIPT OF EVIDENCE

The above cause came on regularly for trial before the Hon. W. D. Murray, United States District

Judge for the District of Montana, sitting with a jury, at Butte, Montana, on April 15, 1959, at 10:00 o'clock a.m. The plaintiff was present in person and represented by her counsel, Mr. Leif Erickson, Helena, Montana, and the defendant was represented by its counsel, Messrs. Robert A. Poore and Urban L. Roth, Butte, Montana.

Thereupon, the following proceedings were had:

The Court: Any ex parte matters? Number 690, Mildred Murphy versus Safeway, are the parties ready?

Mr. Erickson: Plaintiff is ready.

Mr. Poore: The defendant is ready.

The Court: Do you have——

Mr. Erickson: I have two amendments to offer by interlineation in the complaint. In the last line of the first page, which is line 32, insert after the words "constant low back ache" the words "constant pain in the neck and cervical spine"; and in the first line on page 2, after the words "low back" the words "and neck"; and then in Paragraph 4, line 20, substitute for the words "one thousand seven hundred and fifty dollars" the words "three thousand dollars," both in letters and words and in numerals, and I move that the complaint be so amended.

The Court: Any objection?

Mr. Poore: No objection.

The Court: Very well, the amendments are made, call a jury.

(Thereupon, a jury was duly and regularly impaneled and sworn to try this cause.) [2*]

* * *

MILDRED MURPHY

the plaintiff, called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you please state your name?
A. Mildred Murphy.
Q. And where do you live, Miss Murphy?
A. 625 North Montana.
Q. And that is in the City of Butte?
A. Yes, it is.
Q. How long have you lived there, Miss Murphy?
A. All my life.
Q. Is that where you were born?
A. Yes. [7]
Q. What is your age now, Miss Murphy?
A. 50 years.
Q. And you are not married? A. No.
Q. And never have been married? A. No.
Q. Who lives with you? A. Right now?
Q. Yes. A. My one brother.
Q. And he is a bachelor? A. Yes.
Q. And until recently did someone else live with you? A. There was another brother.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Mildred Murphy.)

Q. Will you give us the reason he no longer lives there?

A. He passed away in December, very suddenly.

Q. And did your mother live with you there?

A. Yes.

Q. How long, Miss Murphy?

A. Oh, she passed away in '46.

Q. That was the family home? A. Yes.

Q. And your father died quite a few years ago, is that correct? A. In '23. [8]

Q. And during the later years of your mother's life, she lived with you there? A. Yes.

Q. And you took care of her there, is that correct? A. Yes.

Q. You attended schools here in Butte?

A. Yes, I did.

Q. What has been your occupation, Miss Murphy? A. Waitress.

Q. And for how long a period of time?

A. 31 years.

Q. And where did you first start working?

A. Gamers Confectionery.

Q. And how long did you work there?

A. 27½ years.

Q. So for the first 27½ years you worked as a waitress, you had only the one job?

A. Yes, sir.

Q. And did you work steadily?

A. Yes. I did.

Q. What was the reason you left Gamers?

A. Well, at that time they had changed the

(Testimony of Mildred Murphy.)

confectionery to a bakery, and then it was about the fall of the year, business had fallen off, and he was going to work members of the family, so that let me out. [9]

Q. And then did you go on working as a waitress? A. Yes.

Q. Did you go to work immediately?

A. No, that was—I was a little sick that year, I had an operation.

The Court: Speak up so that everyone can hear what you have to say.

A. Right after I got out of Gamers I had an operation.

Q. It wasn't an operation that had anything to do with your present condition, is that correct?

A. No.

Q. Did you recover fully from that?

A. Very well, yes.

Q. After this operation had been completed and you recovered from it, who did you go to work for next? A. Greens Cafe.

Q. And how long did you work there?

A. I worked there for about four months.

Q. And then where did you work?

A. Then I went to work for—when I worked extra, I was at Grands.

Q. Now, when you work extra, what does that mean?

A. Well, maybe a week in that place and maybe a week somewhere else, wherever you want to go or they call you for.

(Testimony of Mildred Murphy.)

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Q. And you took care of her there, is that correct? A. Yes.

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Q. Now, when you work extra, what does that mean?

A. Well, maybe a week in that place and maybe a week somewhere else, wherever you want to go or they call you for.

(Testimony of Mildred Murphy.)

Q. That would be to fill in for girls who were sick or on [10] vacation? A. Yes.

Q. Do some waitresses prefer that kind of work to a steady job? A. Sometimes they do.

Q. After working extra, where did you go to work regularly?

A. Well, after I worked at Greens, then I worked, I told you, at the Fifteen and Grand, and then I went back to Greens again.

Q. Did you work extra there?

A. Yes, and then I worked at Terry's Drivein, and then I worked at the Finlen, and then I went to Jimmy's Doughnut Shop.

Q. How long did you work at Jimmy's Doughnut Shop? A. Two and a half years.

Q. Whereabouts is it located?

A. On the corner—7 West Park Street, Butte.

Q. Now, when did you leave Jimmy's Doughnut Shop?

A. The last part of April, 1958.

Q. 1958? A. Yes.

Q. Did you work at any restaurants after that, before the time of the accident we will discuss later? A. Yes.

Q. Where did you work then? [11]

A. I worked at the Shanty.

Q. Was that extra work?

A. I was working two days a week there, yes.

Q. Had you had any calls to go to work any place else prior to June 24, 1958?

A. Oh, yes, the A.C.M. Club.

(Testimony of Mildred Murphy.)

Q. And had you gone to work there?

A. Yes, I worked there two days before the accident.

Q. And did you have any plans to work there after that?

A. Yes, I was going to work there after that.

Q. Had you been called to work there?

A. Yes, I was told I was going to work there.

Q. On June 24, 1958, did you have a job at that time, on that particular day?

A. Not that day I didn't.

Q. Now, calling your attention to June 24, 1958, you recall that was a Tuesday, do you?

A. Yes.

Q. And did you have occasion to go to the Safeway Store on Granite Street on that day?

A. Yes.

Q. About what time of the day was that?

A. I imagine it was between 10 and 10:30.

Q. Now, did you go down there alone?

A. No. [12]

Q. Who was with you?

A. My brother Frank.

Q. Is he the one that died suddenly in December? A. He is the one that died.

Q. How did you go to Safeway?

A. In his car.

Q. Where did you park it?

A. On the east side of the Safeway Store on West Granite Street—on East Granite Street, pardon me.

Q. There is a parking lot alongside the east

(Testimony of Mildred Murphy.)

wall of the Safeway Store? A. Yes, there is.

Mr. Erickson: May it please the Court, this is something I should have suggested to the bailiff earlier, but I wonder if I might have the blackboard set up?

The Court: Yes, see what you can do.

Q. Miss Murphy, if this is Granite Street coming across here (indicating drawing on board), what is the street to the east of Granite?

A. Wyoming.

Q. Wyoming? A. Yes.

Q. And if Wyoming is over here (indicating) coming down, would the parking lot be in the intersection between Granite and Wyoming? [13]

A. Yes, it would.

Q. And would this line, roughly—there is a sidewalk, of course here (indicating)—represent Safeway Store with relation to Granite Street and the intersection of Wyoming and the parking lot?

A. I think so.

Q. Now, if this is Granite and Wyoming (indicating), and this the parking lot (indicating), would that be a rough representation of about the way it stands? A. Yes.

Q. You will agree it is rough?

A. It is rough.

Q. And I will, too. Now, with relation to the parking lot, whereabouts did you park the car?

A. Right at the corner.

Q. And when you say that corner, would it be roughly like that (indicating)?

(Testimony of Mildred Murphy.)

A. Yes, it would be about the first stall, I guess you would call it, the first parking space.

Q. Now, when you arrived there with the car, what happened to your brother?

A. He got out.

Q. And where did he go?

A. He was going over to Sears to shop.

Q. And Sears is across Granite Street? [14]

A. Just across from Safeway.

Q. And did you see him go over there?

A. No, I got out—yes, I saw him go over.

Q. Be sure to talk loud enough for the jurors, and I'll get away from this position in just a moment.

A. Yes, he got out of the car and he went over to Sears.

Q. Now, when you got out of the car, I think you told me you got out on the right hand side, is that correct? A. Yes.

Q. And you came around the car, is that correct, to get onto Granite? A. Yes.

Q. Can you say whether or not there is a canopy over the street?

A. There is over the sidewalk.

Q. In front of the store? A. Yes.

Q. Now, with relation to the east side of the store, can you say whether or not the door is on the easterly side, that is, the entrance at the front?

A. Yes, it would be closer to the east side.

Q. Now, is that the door you came in?

(Testimony of Mildred Murphy.)

A. Yes.

Q. Now, what was your purpose in going into Safeway Stores? A. To buy groceries. [15]

Q. Can you say whether you regularly traded at that particular Safeway?

A. Oh, yes, I did, I have been in there lots of times.

Q. And is that over a period of years?

A. Yes.

Q. Now, do you know what your brother was going to do?

A. He was going to Sears to shop. He was looking for some tires, pricing tires.

Q. Did you have anything specific in mind that you were going to buy when you went into Safeway?

A. Well, I know I had to buy coffee, that was one thing for sure.

Q. And did you have anything else in mind buying?

A. Meat and other groceries. Usually when you go in you buy more.

Q. And why is that?

A. Because, well, I like shopping over there, and I do a lot of shopping and I look for bargains. You always pick up something more—you always come out with buying more than you intended to.

Q. And is the reason for that the fact that there are displays that you see?

A. Yes, that's right.

Q. They have a system they call advertised specials, isn't that right? [16]

(Testimony of Mildred Murphy.)

A. Yes, that's right.

Q. Now, when you came into the store—when you come into the store, and I realize that from the front this drawing is even worse than I had thought it was going to be, what do you see when you come into the store? Now, I am referring to June 24th, what did you see when you first came into the store? A. The check stands.

Q. And the check stands are sort of lined up in front of the entryway, isn't that correct, roughly?

A. That's right.

Q. Do you know how many check stands there were? A. Five.

Q. And in order to get into the store proper, you have to walk in this direction (indicating), isn't that correct?

A. That's the way I walked in, yes.

Q. Well, the check stands would be in your way, so you wouldn't go through——

A. That's right.

Q. Now, is this (indicating) the way you walked when you came in that morning?

A. That's right, that's the way I walked.

Q. Now, the coffee counter was somewhere over around in here (indicating), was it not?

A. Yes.

Q. And was that where you were headed for? [17]

A. I was headed for that place, yes, I was.

Q. Now, in order to get there, can you say

(Testimony of Mildred Murphy.)

whether or not you go by the produce or fresh vegetable and fruit bins?

A. Fruit bin, fruit.

Q. Would that be a rough representation (indicating) of about what you see when you first came in? This is, the fruit and the coffee counter would be down there (indicating), is that about the way it would be?

A. Yes, that's just about right, it's about as close as I can tell you.

Q. And can you say whether or not there is a little rail comes out here (indicating) with the shopping baskets or shopping carts back of it?

A. That's where their baskets are.

Q. Now, when you came into the store, will you go ahead now and tell the jury where you went after you got past the checking stands?

A. Oh, wait a minute—when I went down to the coffee place, is that what you mean?

Q. Yes. Now, this little rough drawing shows you came in the front door and you turned and went to the west between the check stands and the window, and you would come over to a place marked "X." Now, where did you go from there?

A. Well, I walked down past that produce counter, and I was headed for the coffee stand. [18]

Q. Which direction were you walking?

A. I was walking toward the north.

Q. That would be toward the rear of the store?

A. Yes, toward the rear.

Q. Now, that would put you out in here some

(Testimony of Mildred Murphy.)

place (indicating), I am marking that with an arrow? A. Just about.

Q. Is that about it?

A. A little further that way (indicating).

Q. You mean a little further this way (indicating) to the rear? A. Yes.

Q. Now, what, if anything unusual, happened when you reached that point?

A. About that time my two feet shot out in front of me and I fell flat on my back and head.

Q. Now, how were you walking with relation to your speed?

A. Just like I always walk, not too fast.

Q. Say it a little louder.

A. I was just walking the way I always walk.

Q. Was there any occasion for you hurrying that morning?

A. No, I had to wait for my brother. He told me to wait for him there and do my shopping.

Q. So there was no reason for you to walk other than your normal way? [19] A. No.

Q. What kind of shoes were you wearing?

A. Sort of a medium heel shoe, regular walking shoes.

Q. By comparison with the shoes you are now wearing?

A. It is about the same type heel. I mostly wear them for walking.

Q. And would you ladies call that a medium heel? A. That is what I call it, yes.

(Testimony of Mildred Murphy.)

Q. Was that the kind of shoe you were wearing on that day?

A. About the same type only built up a little more.

Q. Which one was built up a little more?

A. The cut comes higher.

Q. The heel would be a little higher?

A. No, this part was built up higher (indicating).

Q. You are now designating the front of the shoe?

A. Yes, the heel was exactly the same.

Q. Is that the kind of shoe you generally wear except for dress-up occasions? A. Yes.

Q. What was the condition of the shoes you were wearing that day?

A. They were in good condition, there was nothing wrong with the shoes.

Q. Your work has been of the kind——

A. I had to have good shoes. [20]

Q. What was the condition of the heels?

A. I had had them fixed Saturday.

Q. And this was on Tuesday?

A. This was on Tuesday.

Q. And what kind of lifts were on the heels?

A. Rubber.

Q. Now, will you—you had not made any purchase at the time?

A. No, I didn't get to where I was going.

Q. Did you observe anything unusual about the appearance of the store when you first came in?

A. On entering the store, yes.

(Testimony of Mildred Murphy.)

Q. What did you see?

A. When I got in, I saw the floors were very shiny and nice and clean and all that, real shiny. Of course, I didn't pay too much attention because that doesn't bother me.

Q. You were in there for the purpose of buying groceries? A. Yes.

Q. But you did observe——

A. It was very shiny and everything looked so nice.

Q. Now, when you say it looked very shiny, would that be the what, floor?

A. Yes, as far as I could see.

Q. Did you observe as you came in whether or not the area where you fell seemed to be shiny like the rest of it? A. Yes, it was shiny. [21]

Q. And you noted that? A. Yes, I did.

Q. And nobody called it to your attention?

A. No, they didn't.

Q. Now, had you ever seen the floor as shiny in your other trips to Safeway in the years before that? A. No, I didn't

Q. And you have traded at Safeway, you say, regularly? A. Yes, I do yet.

Q. Now, with relation to June 24, 1958, the date this fall occurred, when was the last time you had been in the Safeway Store on Granite Street?

A. The Monday before after work.

Q. And when was the last time before that?

A. Saturday.

(Testimony of Mildred Murphy.)

Q. The preceding Saturday. And the last time before that?

A. Oh, I stopped in there Friday on my way home from work.

Q. Can you say whether it was your regular practice to stop in and pick up whatever groceries you needed as you came home from work at the Granite Street Safeway Store?

A. Yes, it was.

Q. The result of that was you were in the store frequently, is that correct?

A. Oh, yes, I have been in there lots.

Q. Where did you do your principal grocery shopping before [22] June 24, 1958?

A. We have always bought down at Safeway.

Q. Can you say whether or not that is the place where you bought the great bulk of your groceries?

A. At the Granite Street store, and once in awhile we would go down to the other one on Front Street.

Q. How would you travel from work to your home on Montana Street prior to June 24, 1958?

A. I would get a ride or go by bus.

Q. And can you say whether or not it was your practice to buy relatively small amounts of groceries at a time, what you could carry?

A. Once in awhile, but not always. I used to get a regular weekly order.

Q. And when you did that——

A. There was still always something you had to buy.

(Testimony of Mildred Murphy.)

Q. You have testified you were in Safeway three times in the preceding days, the day before, and on Saturday and on Friday. Did you at that time, or at any prior time observe that the floor seemed to be slick and shiny as you have testified it was on Tuesday? A. No. I didn't.

Q. Was there any occasion before that there it ever seemed unusual to you at all, that is, the floor? A. No. [23]

Q. Do you recall any experience in the years you traded at Safeway before June 24, 1958, when you ever observed that the floor was particularly shiny? A. I didn't pay much attention.

Q. Did you ever observe any other time when it struck you as being that way?

A. Not so much, no.

Q. And you traded at Safeway for a number of years, I gather, before June 24, 1958?

A. Yes.

Q. And I am referring to the Granite Street Safeway. A. Yes.

Q. Did it occur to you when you went into the store and saw it was slick and shiny that it might be slippery?

A. I didn't pay much attention, you know. What I did, I just went about my business, but I did notice it was really shiny.

Q. When you went into the store, you were headed for the coffee counter as your first stop?

A. Yes.

(Testimony of Mildred Murphy.)

Q. Did you observe any of the displays before you got to the coffee counter, particularly?

A. I noticed some bananas, but didn't stop, just passing by I noticed them.

Q. They were on this fruit counter, is that correct? [24] A. That's right.

Q. Did you have any thought of picking up bananas as you left?

A. They looked awfully good, yes, I would have, probably.

Q. Did you notice any of the other displays or any of the advertising?

A. No, I didn't have time. That was about the time I fell.

Q. Now, coming to the fall, you say that you fell just in front of the fruit and vegetable bin, is that correct?

A. That is what I said, yes, that is about it.

Q. And you were headed in a northerly direction, which was toward the rear of the store?

A. That's right.

Q. You say your feet shot out from under you?

A. Yes, sir, that's right.

Q. Did both of them shoot out from under you?

A. Both feet, yes.

Q. Did you stumble before your feet went out?

A. No, it was a complete surprise.

Q. Were you turning? A. No.

Q. Were you stopping? A. No.

Q. And you were traveling at what——

(Testimony of Mildred Murphy.)

A. Just at the usual speed. I wasn't walking fast, I just [25] walked.

Q. Now, when you landed, which way were you lying with relation to the store?

A. My feet would be up that way (indicating).

Q. When you say that way, toward the rear of the store? A. Yes.

Q. And your head toward the front of the store, is that correct? A. That's right.

Q. And you were laying out in front of the vegetable bins?

A. That's right, fruit bins, I guess it was.

Q. Fruit bins. Now, what was the effect of your fall right then, what happened?

A. Well, I just fell flat on my back and my head hit the floor, and I really heard and felt it.

Q. Can you tell us which part of your body hit the floor first?

A. I am not too sure, I just banged the floor. I was taken by surprise.

Q. Did you have the feeling that your feet shot up in the air?

A. Yes, and I jarred the floor. I was more or less in sort of a daze. I did try to lift my head and I couldn't.

Q. Now, what happened when you fell, what events, if anything took place then? [26]

A. Well, I laid there and I did try to lift my head and I couldn't, and I don't know.

Q. Could you hear any sound?

(Testimony of Mildred Murphy.)

A. I just heard a voice of someone saying, "Why doesn't somebody help her?"

Q. Do you know who that was?

A. What?

Q. Do you know who that was?

A. I can't recall the voice, no, because I was just about——

Q. Were you conscious?

A. Oh, yes; I am sure I didn't lose consciousness. I could hear that voice, but at the same time I don't know if I got helped up or not.

Q. Now, in falling, could you hear any sound as a result of the fall? A. You mean a sound?

Q. Yes, of your body hitting.

A. Yes; I heard my head hit. It really banged on the floor.

Q. Do you know how long you laid there before you got up?

A. I don't think so. I don't think it was very long. I can't remember just exactly the minutes.

Q. And you say you can't remember whether somebody helped you up or you got up by yourself, is that correct?

A. I don't think I could have got up by myself. I don't recall.

Q. Do you know—strike that. Were there other people around [27] in that general vicinity when you fell?

A. Yes; there was employees there when I went in.

(Testimony of Mildred Murphy.)

Q. Did you recognize some of them when you came into the store?

A. Oh, I had known them by sight, yes; I had seen them before, yes.

Q. Did you recognize a girl by the name of Rose Ledingham? A. Yes.

Q. Was she one of the checkers?

A. Yes.

Q. Were there customers in the store that you observed?

A. Probably, around the other side. I just saw a couple or a few.

Q. How many employees did you see when you came into the store, have you any idea?

A. I don't exactly know; I didn't check that.

Q. Now, with relation to the spot where you fell and before you fell, did you observe any people who seemed to be employees of Safeway in that general vicinity?

A. Yes; I saw the manager and some boys.

Q. You saw the manager? A. Yes.

Q. Will you keep your voice up. And is that Mr. Frazer, who sits here? A. Yes. [28]

Q. And you saw who else?

A. Some boys, but I didn't know they—I just saw them. They were working, some clerks.

Q. What were they doing?

A. I suppose putting stuff on shelves.

Q. Now, after the fall, and you have testified you are not sure, you think somebody had to help

(Testimony of Mildred Murphy.)

you up. Do you know who it would have been or was? A. No.

Q. Did you have any conversation with any of the employees of the store immediately after you got up?

A. With Mr. Frazer. He asked me if I was hurt and if I should see the doctor, and I said yes.

Q. And was there anyone else around at that time?

A. This girl that took me to the hospital.

Q. Who was she? A. This Rose.

Q. That's Rose Ledingham? A. Yes, sir.

Q. And you knew her there as an employee for some time, is that correct? A. Yes.

Q. What happened then?

A. She took me to St. James Hospital.

Q. In her car? [29] A. In her car.

Q. Was there any conversation that you heard between Rose Ledingham and Mr. Frazer?

A. No.

Q. Before you left?

A. No; only she said she would take me to the hospital, that is all.

Q. Did you see your brother, Frank, as you left the store?

A. As I was going out, he was coming across the street.

Q. Did he go with you to the hospital?

A. No; his car was there, I don't know what he did.

Q. Now, you say Rose Ledingham took you to

(Testimony of Mildred Murphy.)

St. James Hospital? A. Yes.

Q. Was that immediately after the fall?

A. Yes.

Q. Now, could you observe any injury immediately after the fall was over?

A. Oh, my head hurt terrible as soon as I got up off the floor and I could feel a bump on my head.

Q. Did you feel that with your hand?

A. Yes.

Q. Whereabouts was that?

A. Right here (indicating).

Q. You are placing your hand right on [30] the—— A. Right where the bump was.

Q. The back of your head, is that correct, high up? A. Right there.

Q. And did that swelling appear——

A. Right away.

Q. And how large was it at that time?

A. I would say it was good sized. It felt as big as my hand could cover.

Q. Now, when you got to the hospital, who did you see? Did you see a doctor?

A. Yes; I saw Dr. Rotar; I got him.

Q. And did you see him as soon as you got to the hospital?

A. No; I believe it was one of those nurses and we asked for Dr. Rotar, and then they asked what happened, and the girl that was with me said I had fell at the Safeway Stores.

Q. Is this Rose Ledingham?

(Testimony of Mildred Murphy.)

A. Yes, Rose, and then I got to see the doctor, and he looked at my head and felt and said, "You will have to have an X-ray."

Q. And did you have an X-ray?

A. They put me on a wheel chair and wheeled me down to the X-ray room.

Q. How were you feeling at that time?

A. Very rough. I was just—what would you call it—I was just dazed, I guess. [31]

Q. Did anything else hurt beside your head at that time? A. My neck.

Q. Your head and your neck? A. Yes.

Q. Whereabouts did your neck hurt?

A. Right through here (indicating).

Q. Now, you are designating the lower part of the back of your neck?

A. Right through here, right around this way (indicating).

Q. You are now designating the front of your neck? A. Yes; it hurt all around.

Q. At that time did your lower back hurt?

A. Well, I didn't notice it so much that day. I was worrying so much about my head.

Q. Now, you went to the X-ray room, is that correct? A. Yes.

Q. Did Rose Ledingham come in with you?

A. She waited down there until they took the X-ray.

Q. And X-rays were taken at St. James?

A. St. James Hospital.

Q. Do you know what doctor took the X-rays?

(Testimony of Mildred Murphy.)

A. It was a nurse took them.

Q. Now, how long were you in the X-ray room?

A. I couldn't exactly say how long it was. I waited longer to have the X-rays taken than to take the X-rays. I waited [32] quite awhile to have it taken.

Q. Were you in the wheel chair all this time?

A. Yes; I was on the wheel chair.

Q. And how did you feel then?

A. I felt kind of woozy; I felt like going to sleep.

Q. Did you remain conscious? A. Yes.

Q. After the X-rays were taken, what happened then?

A. Well, they brought me up to the elevator, and about that time my brother came in.

Q. You will have to speak up just a little.

A. About that time my brother came in and Rose was with us, too, still, this girl from Safeway, and she said something about going back to Safeway, and Dr. Rotar said, "No, she"——

Mr. Poore: Just a second, please, to which we object as not responsive to the question and also apparently hearsay testimony.

A. What was that?

Mr. Poore: I was speaking to the Court.

The Court: Sustained.

Mr. Erickson: May I ask one qualifying question?

The Court: Yes.

(Testimony of Mildred Murphy.)

Q. Was Rose Ledingham then working for Safeway Stores? A. Yes.

Q. And she took you down there? [33]

A. Yes.

Mr. Erickson: I do not believe it's hearsay, your Honor. Maybe the answer is not quite responsive.

Mr. Poore: I believe the witness was also testifying to some comment the doctor made.

The Court: Well, ask the question again, will you, counsel?

(Question and answer read back by Reporter.)

The Court: And the objection was with reference to the testimony as to what Dr. Rotar said?

Mr. Poore: Yes, your Honor.

The Court: Yes; sustained; it is hearsay. It is responsive to Rose going back to the Safeway.

Mr. Erickson: Yes.

Q. Now, did you see Dr. Rotar after you came up from the X-ray room?

A. No; I was told to go home and go to bed.

Q. Well, who told you to go home and go to bed?

A. Dr. Rotar.

Q. And you did not go back to Safeway?

A. No.

Q. Did Rose tell you why she wanted you to go back to Safeway? A. No.

Q. And your brother, Frank, was there, is that correct? A. Yes. [34]

Q. Did you go home with him?

(Testimony of Mildred Murphy.)

A. He took me home, yes.

Q. Now, what did you do when you got home?

A. Well, I went to bed.

Q. Did Dr. Rotar give you any prescription?

A. Yes; he did.

Q. And did you have that filled?

A. Not right away; I was taken home first.

Q. And who had it filled, do you know?

A. My brother took it down and had it filled, I guess.

Q. Now, you say when you got home you went to bed, is that correct? A. Yes.

Q. And how long did you stay in bed?

A. Not very long, I had to get up; I got sick to my stomach.

Q. Speak up just a little.

A. I got sick to my stomach.

Q. You were nauseated? A. Yes.

Q. Did you throw up? A. Yes; I did.

Q. And what about the balance of that day, did you stay in bed all day?

A. Partly. I couldn't stay right down in bed. I would stay as long as I could and then I had to get up. [35]

Q. And did the nausea continue during the day?

A. Yes; it did.

Q. And how long did that last, that condition of vomiting and nausea?

A. Just about all that day.

Q. And with the exception of the time that you

(Testimony of Mildred Murphy.)

had to get up because of the nausea, you stayed in bed all of June 24, 1958, is that correct?

A. Yes; quite a bit because my head hurt so bad.

Q. Now——

Mr. Poore: Excuse me, I didn't hear the answer of the witness.

A. Yes, my head was aching. My head was throbbing, too.

Mr. Poore: Thank you.

Q. Describe how the headache was on June 24, 1958, describe the kind of headache?

A. Just a throbbing all through my head, both back and front, just a throbbing headache.

Q. And what about your neck?

A. That was hurting, too.

Q. Now, how long did you stay in bed after June 24, 1958, if you did?

A. You mean right down flat all the time?

Q. Yes.

A. I kept getting up and down, and—— [36]

Q. And why did you get up?

A. Well, the next day my back hurt so bad, I hurt all over the next day, completely. I hurt clear from the top of my head to my ankles the next day.

Q. And can you say whether or not you got up because it wasn't comfortable in bed?

A. That's right; I wasn't.

Q. Were you comfortable sitting up?

A. For awhile. I just couldn't get in any comfortable place. I would be up for awhile and I hurt, and I would have to lay down for awhile.

(Testimony of Mildred Murphy.)

Q. And how long did that situation continue, when you were up and down?

A. Oh, at least two weeks, 10 days, about two weeks.

Q. Now, what about the headaches?

A. They continued.

Q. And was that a steady condition, the headache? A. At that time, yes.

Q. And did it remain the same kind, as a throbbing headache? A. For that time, yes.

Q. What about this bump on the back of your head; did that get any larger after you got home?

A. No; that started to go down.

Q. And how long did that stay so that you noticed the bump? [37]

A. Oh, about a week or 10 days. It was still sore after the bump went down.

Q. Were you able to sleep?

A. Not too well, no.

Q. Do you know whether or not Dr. Rotar gave you any sleeping pills?

A. He gave me pills for pain.

Q. And did you take those? Your answer is yes?

A. Yes.

Q. You have to answer, not just nod your head. Did you go back to Dr. Rotar's office?

A. Yes; I went back to him the end of that week.

Q. The end of the first week? A. Yes.

Q. And how long were you at Dr. Rotar's office then?

(Testimony of Mildred Murphy.)

A. He had to take some more X-rays.

Q. And of what part of your body were those X-rays taken?

A. The back; the back and the neck.

Q. And with relation to your back, can you say whether it was the whole back or the low back?

A. Yes; the whole back.

Q. And do you know why X-rays were taken, or weren't taken of your whole back on your first visit there?

A. Well, he said I was under shock.

Q. You hadn't complained to him, though, about your lower [38] back on your first visit, had you?

A. No.

Q. And on the second trip you did?

A. I had had to call him up and tell him. My sister called him.

Q. Now, did Dr. Rotar give you any further prescription on your second visit?

A. Yes; he gave me something.

Q. Did you have that prescription filled?

A. Yes.

Q. Now, after the second trip to Dr. Rotar's office, which occurred at the end of the week that had June 24, 1958, in it, did you go back to Dr. Rotar again? A. Yes; the following week.

Q. And can you say whether or not you made regular trips to his office for some time after you were injured? A. Yes; I did.

Q. And how frequent would those trips be?

A. Well, for the first three weeks I went once

(Testimony of Mildred Murphy.)

a week and then about every two weeks and then it dwindled down to about every three weeks.

Q. When was the last you saw Dr. Rotar?

A. About a month ago.

Q. And is he still your doctor?

A. He hasn't dismissed me; he hasn't discharged me. [39]

Q. Now, what treatment, if any, did Dr. Rotar prescribe for you?

A. Just medicine and told me to rest.

Q. Did he suggest hot packs or hot baths?

A. Yes; he told me to take a hot bath, and heat, thinks like that.

Q. Now, have your sleeping habits changed any from what they were before the accident?

A. Oh, yes; I never had any trouble sleeping.

Q. What about now?

A. I sleep about three hours, maybe four.

Q. A night? A. That's about it.

Q. Is that the average amount you get?

A. Yes, and sometimes I don't get that.

Q. And why is it you don't sleep?

A. I don't know, maybe it is my nerves or something, and then my back bothers me and I have headaches.

Q. Do you still have headaches?

A. Yes; I do.

Q. Are they the same kind as they were originally?

A. Well, I don't have that throbbing headache.

Q. Describe what kind they are?

(Testimony of Mildred Murphy.)

A. I have more of a, well, more of a dizzy headache.

Q. How long do they last? [40]

A. Sometimes they last about three days.

Q. And how frequently are you now having them?

A. Sometimes twice a week. Sometimes they don't last three days, sometimes two.

Q. What do you usually do for those headaches?

A. Oh, I take medicine; I take pills; I take a lot of aspirin.

Q. And does that give you any relief?

A. Just temporary.

Q. Now, with relation to your neck, you testified that immediately after the accident it hurt, is that correct? A. Yes; it did.

Q. And you indicated that the portion of the neck that hurt most was down pretty close to where the neck joins the shoulders, is that correct?

A. Yes; right there.

Q. I noticed when you put your hand around the back of your neck, you raised your head up. Do you do that because it gives you some relief?

A. It gives me ease, yes.

Q. And do you do that regularly?

A. Quite a bit.

Q. Is your neck still hurting?

A. Yes; it does.

Q. What about comparing it now with the way it was right [41] after the accident, does it hurt less or more or——

(Testimony of Mildred Murphy.)

A. There hasn't been any change in the neck. That still hurts me just as much, a continual ache.

Q. Not to paraphrase the slang, but does that pain in the neck, is that part of the reason you don't sleep? A. I think so, yes.

Q. Now, what about the rest of your back? Now, calling your attention particularly to your lower back, does that bother you?

A. That's a constant ache.

Q. And whereabouts is that?

A. Just down in the lower part of my back here (indicating), down here.

Q. And you are now indicating the lower part of what we would call the small of the back, is that correct? A. Yes.

Q. Pretty much where your back joins onto your hips? A. Yes.

Q. When did that first start bothering you?

A. Right that next day.

Q. You didn't notice it particularly on the first day?

A. No; I was too upset, I guess; I was more or less in shock. I just didn't think. I was so worried about my head. I was afraid of a crack on the head.

Q. Has that pain in the lower back been continuous since the [42] first day?

A. It has been continuous.

Q. Can you say whether it is better or worse or just about the same?

A. Just about the same, I would say.

Q. Does that have any effect on your sleeping?

(Testimony of Mildred Murphy.)

A. It sure does.

Q. Can you lie or sit in the same position for any length of time?

A. Not very long; no, I can't.

Q. What is the reason for that?

A. Sometimes when I lie down for awhile, it hurts and when I get up and sit down it hurts, and if I walk up and down stairs, it hurts.

Q. Mildred, before your accident, did you have any trouble with your back?

A. No; I didn't.

Q. Had you ever had any trouble at all with your back?

A. You mean a pain in the back or something?

Q. Yes.

A. Oh, a slight pain with a cold or something, but otherwise nothing.

Q. Did you ever have to lay off work because of a back ache?

A. No; I never had to lay off work for [43] anything.

Q. Now, your work as a waitress, referring now particularly to Gamers, the 27½ years you worked there, did you ever have to lay off because of a back ache? A. No.

Q. Or a neck ache? A. No; I didn't.

Q. Did you have headaches before your accident?

A. No; only if I had a head cold or something.

Q. What about taking aspirins, did you take

(Testimony of Mildred Murphy.)

aspirins as a regular thing before your accident?

A. Not too much.

Q. What would they be taken for?

A. Just if I had a cold.

Q. Now, up until the time of your accident, as a part of your regular work, the work of any waitress, you have to carry loaded trays, do you not?

A. Yes; I did.

Q. How tall are you?

A. Five foot two.

Q. And what do you weigh?

A. About 130 pounds.

Q. And did you ever have any trouble carrying loaded trays? A. No.

Q. And sometimes when you are working as a waitress, you don't use trays, but still carry quantities of dishes on your [44] arm?

A. That's right. Most of the places I worked, though, I used a tray.

Q. Did you ever have any trouble carrying dishes? A. No; I did not.

Q. And you observed, of course, over these many years you have been a waitress, did you seem to be able to carry the same loads as any waitress does?

A. Oh, yes.

Q. Would it be possible to hold a job if you couldn't? A. I doubt it.

The Court: I think, counsel, if I may interrupt, I think we may recess at this time. (Jury admonished.) Court will stand in recess until 2:00 o'clock.

(Noon recess.)

(Testimony of Mildred Murphy.)

The Court: You may continue.

Q. Mildred, I believe the last questions I asked you about concerned your carrying trays when you were working as a waitress and you said you didn't have any trouble?

A. No; I didn't have any trouble.

Q. Who takes care of your house where you live? A. You mean——

Q. Who does the work?

A. I do; the house work, I do that.

Q. And how long have you done the house [45] work?

A. Oh, I have kept house for the last 16, about 16 years.

Q. And is that since the death of your mother?

A. Yes, she is dead 13 years, and she was sick three or four years before that.

Q. And did you keep house in addition to working as a waitress? A. Yes; I did.

Q. Until the accident on June 24, 1958, were you able to do the house work?

A. Before my accident?

Q. Yes. A. Yes; I was.

Q. And of what did that house work consist?

A. Well, I keep house for myself and my two brothers. I scrub, wash, clean, scrub windows, walls, everything else concerning the house work. I had no trouble doing it.

Q. Did you have a cleaning woman?

A. No.

Q. How large a house is it?

(Testimony of Mildred Murphy.)

A. Seven rooms.

Q. Now, I have observed around the house a yard and garden and flowers. A. Yes.

Q. Who took care of those?

A. I took care of the flowers, part of it. [46]

Q. And you did that up to the time of the accident? A. Yes.

Q. Now, since your accident, have you been able to do your regular house work?

A. No; not all of it. I do a little, but not all of it.

Q. What do you do now?

A. I wash the dishes and sweep the floor.

Q. Do you prepare the meals?

A. Sometimes I do.

Q. What about the windows?

A. No. I have tried it, but I just can't do it.

Q. When you say you tried, will you describe what you done as far as washing windows is concerned?

A. I got up on a chair and tried to wash them, but I just couldn't do it. I got all in. I get dizzy, too.

Q. Will you speak up just a little louder?

A. I got so dizzy and my back hurt, and I just couldn't do it.

Q. What about scrubbing?

A. No; I can't scrub.

Q. Now, how do you get that work done now?

A. Well, my sister helps me and my brother

(Testimony of Mildred Murphy.)

does a little and sometimes my neighbor helps me, too.

Q. But you are not able to do it?

A. No; I am not. [47]

Q. You have testified that after the accident you were nervous, is that the case?

A. Yes; I am, and I still am very nervous.

Q. You will have to speak up.

A. I still am very nervous. Yes; I was nervous after the accident, and I still am.

Q. And how do you know you are nervous?

A. Well, I can't sleep the way I should, and crowds bother me; I just don't want to go any place or do anything; I just want to go away by myself; I don't want to see people.

Q. And how were you before the accident?

A. Oh, I wasn't afraid to go any place. I used to go out quite a bit.

Q. And in your work as a waitress, you had to meet people all the time?

A. That's right, crowds never bothered me, people never bothered me, but they do now.

Q. Is that any different now than it was right after the accident?

A. I'm still pretty nervous, I still want to get away and not be around anybody.

Q. You will have to speak up a little.

A. I said I still feel like I want to get away and not be around anybody.

Q. Your sister, Margaret Rosa, has children, has she not? [48] A. Yes.

(Testimony of Mildred Murphy.)

Q. And prior to the accident could you say whether they were at your house a lot of the time?

A. Quite a bit of the time, usually every day or so.

Q. And did you enjoy them there?

A. Yes; I did, very much.

Q. What is the situation now?

A. Now everything gets on my nerves.

Q. Can you say whether or not you are as cheerful——

A. No; I am afraid I am very cranky and morbid, I guess is what you would call it. I just don't feel like doing anything any more. I just feel awful different.

Q. Now, do you feel in your present condition, having in mind your neck and your headaches and your lower back and your nervousness, do you feel you would be able to go back waiting on tables?

A. No; I don't. I am sure I wouldn't; not for quite awhile. I would have to improve a lot more.

Q. Do you feel you could do it, say, today?

A. No; I know I couldn't.

Q. What education do you have?

A. I have three years high school.

Q. Have you trained for any other type of work at all?

A. No; that was my first job, and I stayed with it.

Q. Can you type or do stenographic work? [49]

A. No; I can't.

Q. Have you ever done sales work?

(Testimony of Mildred Murphy.)

A. No.

Q. Do you have any idea of any other kind of a job besides waiting on table that you could do?

A. Oh, I imagine—I never thought of any other besides waiting on table.

Q. And you have never held any other kind of a job? A. No.

Q. Now, in your complaint, Miss Murphy, you have alleged that prior to the accident your total earnings were $75 a week. What was the scale paid for waitresses? As I understand in Butte, the waitresses belong to a union, do they not?

A. Yes.

Q. What was the union scale on June 24, 1958?

A. For the week, for five days?

Q. Yes.

A. On a five-day week basis, it was $38.70, and time and a half for the sixth day.

Q. And time and a half for the sixth day. Was it the practice in Butte at that time to work the sixth day? A. A lot of them did.

Q. What about you on the last job you had?

A. I was working six days. [50]

Q. And what was your scale?

A. That was before the 15th of May last year.

Q. That was under the old scale, is that right?

A. Yes; you got $44.04 for six days.

Q. And under the new scale, how does that work on a daily basis, Miss Murphy?

A. $7.74 a day.

(Testimony of Mildred Murphy.)

Q. And for the sixth day, if you worked the sixth day, you would get $7.74, plus——

A. $3.87.

Q. Which would make——

A. $11.61 for the sixth day, which would——

Q. Which would make the total earnings under the new scale in effect at the time of your injury $55.65, according to my figures. Does that square with yours? A. What was it?

Q. $55.65—no, I am sorry; that's wrong.

A. It was 50 something.

Q. What is the new weekly scale for five days?

A. $38.70, plus $11.61.

Q. Which would be $50.31, is that correct?

A. That's right.

Q. Do you know whether that scale is still in effect? A. So far, yes.

Q. You worked for a few days prior to your injury as [51] business agent for your union, didn't you? A. Yes; I did.

Q. So you are familiar with the wage scales even though you are not now working, is that correct?

A. That's right.

Q. Now, did you receive any compensation in addition to this basic wage?

A. Yes; we make tips.

Q. And in the jobs you have held, did you get tips in each one of them? A. Yes.

Q. Now, in relation to your work at Gamers, can you tell the jury what your average tips would be in a day?

(Testimony of Mildred Murphy.)

A. Well, I have made an average of $3 to $5. Sometimes you went over that, sometimes you went less.

Q. Can you say that is about the average no matter where you work?

A. Well, you can go more than that in a bigger house.

Q. By a bigger house, you mean a hotel or some place like that?

A. Yes, and Gamers was good.

Q. And in some of the places the tips would not run quite that high, quite as high as a hotel, is that correct? A. That's right.

Q. Can you say whether or not it is the fact that the people [52] in Butte generally are generous or not generous tippers? A. Yes; they are.

Q. And is it true that working at Jimmy's you also got tips? A. Yes; I did.

Q. And what would they run down there?

A. Sometimes I would hit three, four, five, sometimes two.

Q. Could you say what the average would be if you picked a figure, three, four, five dollars?

A. I could say five.

Q. Now, in addition to the tips, did you get anything else by way of compensation?

A. Well, we received our board.

Q. How many meals a day?

A. You are entitled to three meals a day.

Q. And did you usually eat three meals at your places of employment?

(Testimony of Mildred Murphy.)

A. Most of the time.

Q. That is breakfast, lunch and dinner, is that correct? Your answer is yes?

A. Yes; pardon me.

Q. Do you know what the value of those meals would be?

A. You mean to me it would be?

Q. Yes.

A. Well, if I had to go out and buy them, it would cost me [53] about $3 a day, but in a restaurant, it don't cost that much.

Q. So that——

A. That goes in on your salary.

Q. So, your earnings if you worked a five-day week would be $38.70, plus $25 a week for tips, plus $15 a week as the value of the meals, is that about correct?

A. If I had to buy them myself.

Q. And that would total $78 a week, the way I figured it as the rate of pay you would now expect to be earning if you were working, is that correct?

A. Yes, sir.

Q. And whether it would be more or less than that depends on whether the tips average the $5 a day, above or below that? A. That's right.

Q. Now, do you know whether there is and has been since June 24, 1958, work available for an experienced waitress like yourself?

A. Well, I have been called for jobs while I have been sick.

(Testimony of Mildred Murphy.)

Q. When you say you have been called for jobs, what does that mean?

A. I have been called on the phone for jobs—what do you mean, for me to——

Q. Yes; to work as a waitress. A. Yes.

Q. Who have those calls come from? [54]

A. Well, I had one come from—you aren't counting that business agent stuff?

Q. No.

A. I have had a call from the A.C.M. Club, I have had a call from the Shanty, and then I got calls from the union at different times.

Q. How many calls from the union, about?

A. Oh, they call on the average of every month or so to see if I was feeling all right and able to work.

Q. Were they calling for the purpose of putting you to work? A. If I could take a job, yes.

Q. Prior to the time of your accident, did you ever have any trouble getting a job? A. No.

Q. Did you ever draw unemployment compensation? A. Once, in '54.

Q. And for how long a period?

A. The full time.

Q. For the full 22 weeks? A. Yes.

Q. Is that the time——

A. I had the operation.

Q. You had the operation and you were convalescing? A. That's right. [55]

Q. Have you drawn any since that time?

A. No—yes; I drew some here last May.

(Testimony of Mildred Murphy.)

Q. Was that before the time——

A. Before the accident.

Q. How many checks did you draw?

A. Oh, not more than four or five at the most.

Q. But with the exception of those two periods, has there been any time you had any trouble getting a job? A. No.

Q. And since the accident you have had a number of calls, do you have any idea how many calls altogether since the accident for work?

A. About 12, 14.

Q. What was the most recent call you had?

A. About a month ago the union called and asked if I was able to work, and wanted to know how I was.

Q. And did you testify this morning that at the time of the accident you had had a call to go to work later for the A.C.M. Club? A. Yes.

Q. When was that job supposed to start?

A. In July.

Q. And was it your hope that that was going to be a permanent job?

A. Well, as long as I could take it, yes. [56]

Q. Comparing your condition now and what it was at the time this complaint was signed, which was on December 10, 1958, that would be approximately five months ago, four months ago, can you say whether your condition is substantially the same, worse, or better?

A. It is not any better. I still have my backache

(Testimony of Mildred Murphy.)

and my headache and my neck, along with my nervous condition.

Mr. Erickson: May I have just a moment, your Honor.

The Court: Indeed.

Q. In your complaint you say that you have had to spend or obligated yourself to pay certain bills for medical and hospital care. Referring now first to Dr. Rotar, who, you say, has been your regular doctor, have you paid Dr. Rotar anything?

A. $20.00.

Q. And do you still owe him more?

A. Just a little bit, not much.

Q. How much, do you know?

A. I really haven't got another bill.

Q. And you don't know how much that is?

A. Not for sure.

Q. He charges you at the rate of $3.00 a call, is that correct? A. That's about it.

Q. So up to date the amount you actually paid Dr. Rotar is [57] $20, and he hasn't billed you for the balance? A. That's right.

Q. When did he last bill you?

A. That's the $20 bill that I got that I paid.

Q. How long ago was that?

A. About a month ago or two months ago.

Q. Did you receive a bill from Dr. Plett?

A. Yes.

Q. And why did Dr. Plett examine you?

A. Well, right after the accident my ears bothered me; I had a lot of trouble with my ears.

(Testimony of Mildred Murphy.)

Q. Has that cleared up?

A. Yes; that's all right.

Q. And how much did you pay Dr. Plett?

A. $10.

Q. Now, have you paid the St. James Hospital?

A. No; not yet.

Q. How much do you owe St. James?

A. $110.

Q. You were also examined by Dr. Clemmons, were you not? A. Yes.

Q. How many times? A. Twice.

Q. And did he take X-rays?

A. Yes; he did. [58]

Q. And do you know that his statement for his first examination and X-rays is $160?

A. Yes.

Q. Has that been paid?

A. No; it hasn't.

Q. And you haven't received a bill for this second treatment, is that correct, or this second examination? A. That's right.

Q. So you don't know what that will be?

A. No; I don't.

Q. And he took a number of X-rays, just as was done at St. James? A. Yes.

Q. Do you know what you paid for each X-ray?

A. Where at?

Q. At either place. Is the standard price $15 per X-ray, do you know that?

A. I think so; I am not sure.

Q. Now, in addition to these items of medical

(Testimony of Mildred Murphy.)

attention, examination and care, have you had any expense for drugs?

A. Yes; I have had some.

Q. And do you know what the total of that is?

A. I didn't keep track of it, I really didn't. I just paid for it as I went along. I didn't keep track of it.

Q. You paid cash? [59] A. Yes.

Q. You had several prescriptions from Dr. Rotar, did you not?

A. About four—yes; I did.

Q. Different kinds of them?

A. Yes; I did.

Q. And did you pay the same amount to the drugstore for each prescription they filled?

A. No; one I had was $2.50 and one was $1.50.

Q. Do you know how many of the $2.50 ones you had? A. Just two.

Q. That prescription was filled twice?

A. It was two different prescriptions, I think.

Q. That cost the $2.50? A. Yes.

Q. Do you know how many of those $2.50 prescriptions you had filled altogether?

A. No; I don't.

Q. Can you give us an estimate?

A. No; I can't. I didn't keep track of that.

Q. Well, was it more than one?

A. Maybe about two is all I had of that one.

Q. So that would be $5 for those two, is that correct? A. Yes.

Q. And the other prescriptions, the ones that

(Testimony of Mildred Murphy.)

cost $1.50, how [60] many times did you have them filled?

A. I had them, but they were two different prescriptions, a $1.50 each time.

Q. Were there any other prescriptions besides these three that you referred to?

A. I can't think.

Q. What about other medication?

A. I had a lot of aspirin; I took an awful lot of aspirin.

Q. Do you know what they cost you?

A. I took about eight a day.

Q. About eight a day?

A. Yes. I have no idea what that would come to.

Q. Now, do you expect that you are going to continue to have medical attention?

A. The way I feel now, I am sure——

Mr. Poore: To which we will object as calling for a conclusion of the witness.

The Court: Sustained. I don't believe she is in any position to determine whether she is going to need medical attention, is she?

Mr. Erickson: I'll rephrase the question.

Q. Do you expect to have to go to see Dr. Rotar again? A. I probably will.

Q. What about Dr. Clemmons?

A. Well, he did say—well, no, I am kind of puzzled what to [61] do.

Q. You will have to speak up a little louder.

A. I may. I will take treatments from Dr. Clemmons, I think.

(Testimony of Mildred Murphy.)

Q. And do you have any way yourself of knowing how much money you will probably have to spend for future medical care?

Mr. Poore: To which we object as remote and speculative and calling for a conclusion of the witness.

The Court: Sustained. I don't believe she is in any position to give an estimate of that.

Mr. Erickson: Very well. That is all.

Cross-Examination

By Mr. Poore:

Q. Miss Murphy, as I understand your testimony, you had done a good bit of shopping there at Safeway prior to the happening of your accident on June 24, 1958? A. Yes.

Q. And in fact you shopped largely there and then maybe one other spot, is that right?

A. Yes.

Q. And you went in there nearly every day during all the six days of the week, Monday through Saturday? A. Oh, no.

Q. I guess I misunderstood you. I thought you said on your way home from work you would stop in there and pick something [62] up?

A. That wasn't every day.

Q. Oh. Well, about how frequently during the week would you say you stopped in there?

A. Different weeks, different times, but I had happened to be in there three times the week before I got hurt.

(Testimony of Mildred Murphy.)

Q. Over what period of time had you shopped there at that particular Safeway Store?

A. For years.

Q. It has been there approximately 20 years?

A. I guess it has; I wouldn't know.

Q. A good many years?

A. A good many years I went there. It is practically the only grocery store around that part of town, big one.

Q. And it was used by you primarily in getting your household groceries? A. Yes.

Q. You did the shopping for the family?

A. Yes.

Q. That would be for your two brothers and yourself? A. And myself.

Q. Now, prior to this June 24, '58, did you ever have any difficulty in the store? A. No.

Q. Never had slipped or fallen? [63]

A. No.

Q. Now, would you say that the store, as it existed on that particular day of June 24, '58, was well lighted? A. Yes.

Q. Nicely laid out? A. Yes.

Q. I think you said that it was shiny and nice and clean?

A. It was; it was real shiny and nice and clean.

Q. And I believe you said that you liked shopping over there, referring to the store?

A. Yes; I did.

Q. Was the floor level and smooth, in other words, a flat surface? A. As far as I know.

(Testimony of Mildred Murphy.)

Q. What would you say about the color pattern of the tile, the asphalt tile that was laid there, would you say it was a good color pattern as far as visibility was concerned? A. I think so.

Q. So would it be fair to say, Miss Murphy, that the store, you believe, was well laid out and well planned? A. To my knowledge, sure.

Q. And prior to the particular day in question, would you say that it had been well maintained?

A. What do you mean by that?

Q. Well, the floor in particular, had the floor been well [64] kept?

A. Oh, yes; it was real shiny.

Q. But prior to the particular day, you never had any occasion—you never had slipped or fallen?

A. No.

Q. And this would be over a period of many years and dropping in for your usual shopping for the family? A. Yes.

Q. Now, directing your attention to the particular day in question, I think you said that you went in the store about 10:00 or 10:30 in the morning?

A. Between that time, yes.

Q. And what was the condition of the weather outside? A. It had rained.

Q. Was the outside damp, the outside, the surfaces around the store damp?

A. What do you mean, the sidewalk?

Q. Yes; the sidewalk and parking lot.

A. No.

Q. Well, you say it had rained. The fact is, is

(Testimony of Mildred Murphy.)

it not, that your feet were wet as you came into the store?

A. Well, I just got out of the car, and I didn't walk very much.

Q. No, but isn't it a fact that you walked from the car to the front entrance, and by that time the bottom of your shoes [65] and heels were wet?

A. I don't think so.

Q. You don't believe so. Now, you say that the shoes that you had on on that particular day were, did you say identical or similar to the——

A. Similar to the ones I got on, the same heel.

Q. The same heel. Now, how high would you say that heel is?

A. An inch and a half, would you?

Q. In measuring a lady's heels, am I correct, that you would measure from the bottom where it touches the ground—— A. Yes.

Q. ——up to the inside of the heel, the inside part?

A. I imagine, yes; I think that's about what it is. I never measured it.

Q. Am I correct that this portion of the shoe that I am describing here (indicating), from the instep, from the bottom of the instep down is what would be called the heel of the shoe?

A. That's right.

Q. So then the question that I have asked is approximately how high the heel itself is, is that right? A. Yes.

Q. And the shoes that you had on on that par-

(Testimony of Mildred Murphy.)

ticular day were approximately or about the same as those there? A. That's right. [66]

Q. And would you mind if I measured them?

A. No.

Mr. Poore: I have got a pretty fancy ruler somewhere.

The Court: If you can find it.

Mr. Poore: If I can find it.

Q. You are a pretty good guesser. Would you say that would be an eighth of an inch less than two inches, in other words, one and seven-eighths inches tall, or long, this little mark right here (indicating)? A. It is almost two inches.

Mr. Poore: Do you want to take a look at it, Mr. Erickson?

A. It is almost two inches.

Q. Yes; practically two inches, an eighth of an inch less than two inches. Do you remember what sort of dress you had on that day, Miss Murphy?

A. What?

Q. What color dress? A. Black.

Q. A black dress. And when did you first notice as you came into the store there that the floor seemed shiny to you?

A. After I got through that—where they used to have the gate, the turnstile——

Q. The turnstile.

A. But that was open, there wasn't one there, and as I got [67] in there, that's where I noticed that it was quite shiny.

Q. Now, referring to Mr. Erickson's diagram,

(Testimony of Mildred Murphy.)

and pointing to what I understand is the entrance to the store, where would you say the turnstile was? Would you mind coming down and making a dot where the turnstile was?

A. Let me see, well, you get past, right about there, past the check stands.

Mr. Erickson: A little louder.

Q. I see, about level with the check stand.

A. A little past that.

Q. The floor prior to that, between there and the door, there is also this linoleum tile, is there not? A. I didn't notice.

Q. So that it wasn't until after you got past the check stand, where I made a little circled "1," that you noticed how shiny it was? A. Yes.

Mr. Erickson: Mr. Poore, would you mind swinging that so the jury could see?

Mr. Poore: Yes.

Q. And then from there to the place that you fell, how far would you say that was, Miss Murphy?

A. In distance?

Q. Yes.

A. Oh, could I diagram from about here to those chairs, like [68] that? Could I say it that way?

Q. Sure. A. I am not sure.

Q. A distance from about where you are to the chairs, referring to the chairs in the courtroom?

A. I judge it that way. It might not be quite that far.

Q. Eight full paces, or about 24 feet?

A. It could be.

(Testimony of Mildred Murphy.)

Q. Would that be approximately right? Would that be approximately the distance from where you first noticed it to be shiny to the place where you fell? A. I think that's about it.

Q. Now, in that distance did you change your gait in any way, change the way you were walking?

A. No.

Q. You didn't slow down?

A. I wasn't walking fast to start with.

Q. You didn't stop? A. No.

Q. You didn't actually inspect the floor?

A. No.

Q. Did you rub your foot on the floor to see if it was actually slippery?

A. I didn't think of that.

Q. In any event, you didn't do it? [69]

A. No.

Q. And after walking approximately that distance is when you slipped and fell?

A. Well, my two feet were just taken, just shot out in front of me.

Q. Now, after you slipped and fell, I believe you said that a girl or young lady or woman named Rose took you to the hospital?

A. That's right.

Q. And how did you go down there, in what kind of a conveyance? A. In her car.

Q. In her car. Now, on the way down there, do you recall telling this girl, Rose, that you believed you slipped and fell because your shoes were wet and were slippery?

(Testimony of Mildred Murphy.)

A. No; I didn't converse with Rose at all.

Q. So you would say that you did not have any such conversation as that? A. No; I didn't.

Q. After you got down to the hospital, you were treated by Dr. Rotar, is that correct?

A. Well, he examined my head, and he said I would have to have an X-ray, and that was where I was worried about was my head.

Q. Now, am I correct in this that you had walked out of the [70] store from where you had fallen to Rose's car? A. Yes.

Q. And you rode down to the hospital?

A. Yes.

Q. Did you walk into the hospital?

A. With Rose, yes.

Q. And then when you left, how did you get home again?

A. My brother brought me home.

Q. Did you walk from the hospital out to your brother's car? A. Yes.

Q. Then, as I understand it, you were treated by Dr. Rotar over a period of time, and his bill to you was $20?

A. So far, but I am sure I owe him more.

Q. And he saw you approximately a month ago?

A. Yes.

Q. Now, what again was the nature of Dr. Rotar's treatment of you, Miss Murphy?

A. Well, he gave me medications, pills.

Q. Those are the same pills that you had filled, two prescriptions of each? A. Yes.

(Testimony of Mildred Murphy.)

Q. And other than that, I believe you mentioned heat, did you not? A. Yes. [71]

Q. Was there any other prescription or was there any other treatment by Dr. Rotar?

A. Well, later on he told me to take hot baths.

Q. And other than hot baths and pill prescriptions, I believe—— A. And rest.

Q. And rest. Was there anything else that Dr. Rotar prescribed? A. No.

Q. Were you ever hospitalized?

A. For this accident?

Q. Yes. A. No.

Q. You never had any casts on? A. No.

Q. Never had a special garment prescribed for you? A. No.

Q. Never had a board to be put in your bed or anything like that? A. No; I didn't.

Q. No physical therapy? A. No.

Q. And you never had to go down to the Civic Center to take any kind of therapy there?

A. No; I didn't.

Q. Or to the Community Hospital? [72]

A. No.

Q. Now, during this period of treatment by Dr. Rotar, how did the treatment change?

A. What do you mean by that?

Q. Well, it started out, as I understand, maybe I have this wrong, it started out with some pills and rest and heat, and was that ever changed, or was that the constant treatment he prescribed?

A. That's it.

(Testimony of Mildred Murphy.)

Q. Did he ever prescribe any exercises?

A. Once he told me to try exercises.

Q. And what particular exercise did he ask you to try?

A. Just to bend my back, stand up against the wall and bend my back. I couldn't do it.

Q. And did you advise him you couldn't do it?

A. I think I did.

Q. Did he show you how you were to do it?

A. No, he just told me.

Q. Did you show him how you were doing it?

A. No.

Q. And after you advised him that you just couldn't do it, he didn't explain it to you further?

A. No.

Q. Now, these times that you went down to see Dr. Rotar, that was at his office at the St. James Hospital? [73] A. Yes.

Q. And you rode down in your brother's car?

A. That's right.

Q. The first few days you were home after the accident, apparently you were sick to your stomach, and it was necessary for you to get up quite frequently? A. Yes, it was.

Q. Were you ever attended by anybody other than members of your family at home?

A. To stay with me?

Q. Yes.

A. Other than neighbors to come in once in awhile.

(Testimony of Mildred Murphy.)

Q. Now, when was it that Dr. Plett treated you, Miss Murphy, approximately?

A. In November.

Q. November of '58. A. Yes.

Q. And I believe you said there was a bill from Dr. Clemmons.

A. Did you say Dr. Plett or Clemmons?

Q. Excuse me, I am sorry. Jumping around that way is a little bit confusing. You had seen Dr. Plett in November?

A. No, no, Plett was in July, right after the accident.

Q. That was shortly after the accident itself?

A. Yes.

Q. And he charged you $10 for his [74] treatment? A. Yes.

Q. You were referred to a bill that Dr. Clemmons made out or rendered to you. Did you ever receive that bill? A. Yes.

Q. Do you have it with you? A. No.

Q. Do you know how much it was of your own knowledge? A. $160.

Q. And did Dr. Clemmons ever treat you himself? A. No.

Q. You have never received any treatment from Dr. Clemmons? A. No.

Q. I believe you stated that before the accident, Miss Murphy, you were taking jobs here and there around town, is that accurate? A. Yes.

Q. You had finished your regular job at Jimmy's late in April, was that your testimony?

(Testimony of Mildred Murphy.)

A. That's right.

Q. And since the accident, why you have had some calls to go to work? A. Yes.

Q. Wouldn't you say, also, though, Miss Murphy, that since the time of the accident, namely, last June, that the conditions have been pretty tough in Butte, economic conditions? [75]

A. Well, I have always been able to get a job no matter how tough they have been in the past.

Q. Haven't a good many restaurants closed up in that time? A. Quite a few have.

Q. For example, Nadine's down there on Galena and Main Street, that closed up about that time, didn't it?

A. Well, I have never before found any trouble to get a job, and I have had calls since.

Q. All right, but I was calling your attention to that particular restaurant. How about the Chatterbox on Utah, didn't that fold up about July?

A. I don't pay any attention to those places.

Q. And the Patio on East Park Street, that is a restaurant that closed last fall, didn't it?

A. I don't know.

Q. You were working there for the Women's Protective Union in regards to waitresses' jobs?

A. Yes, but I was just working extra at that time for the business agent.

Q. And the Five Mile, I believe they folded up about in December, that's a restaurant out on the Flat. Didn't Ken's Cafe out on East Park Street close, and Sandy's on Park and Montana that used

(Testimony of Mildred Murphy.)

to be the old Bee Hive across from old Gamers close up last fall? A. Yes. [76]

Q. Each one of those employed waitresses, did they not? A. Yes, a few.

Q. The Shamrock Cafe? A. That didn't.

Q. The only—in other words, isn't it accurate——

Mr. Erickson: May I have an objection? I don't believe the last question was answered, and the new question assumes something that——

Q. Excuse me, what was the last answer to my last question, would you read it to me, please, Mr. Parker?

(Question and answer read back by Reporter.)

Q. The Shamrock Cafe down on South Main and Galena.

The Court: I think she said that didn't employ waitresses, isn't that what your answer was?

A. Yes.

Q. (By Mr. Poore): Miss Murphy, wouldn't it be fair to say with these cafes closing and the general economic conditions this last few months, this last year or so has been unusual and difficult?

A. Being an old member of the union, I get the preference, I get the call.

Q. I see. I didn't understand quite on your figures that your tips would run around 3 to $5 a day, and then I believe Mr. Erickson asked what you

(Testimony of Mildred Murphy.)

thought they would average, and your answer was $5. I just got mixed up on it. How did you [77] arrive at that figure?

A. Because sometimes you make more.

Q. I see, in other words, other than being an average of 3 to $5 a day, it would be 3 to something greater than 5, is that it?

A. Well, I don't understand that question.

Q. Well, what would you say your tips averaged during this period of time Mr. Erickson was referring to? A. About $5 a day.

Q. And what would be the extremes, $3 would be the low figure, apparently, and what would be the high one? A. You could get 7 or 8.

Q. I see.

A. Depending on where you worked.

Q. So that the average would be about 5?

A. Yes.

Q. Now, on the question of the board, I believe you said you received three meals a day there?

A. That's what we are entitled to.

Q. And what did you say those were worth to you?

A. Well, if you had to buy it outside, you would have to pay at least a dollar for each meal, don't you think so?

Q. Yes. What I was trying to get at though was whether you were basing the value of the meals on what the people that would come into the restaurant would have to pay? [78]

A. Well, that's what I figured the question was.

(Testimony of Mildred Murphy.)

Q. And, of course, since that time you have been paying for your meals at home, isn't that right?

A. That's right.

Q. And would you say that the same scale would apply, would you still say that your meals at home cost about a dollar each, or more?

A. Oh, no, I don't think so.

Q. As to the accident itself, now, getting your mind back again, Miss Murphy, you didn't notice any spots or discoloration or anything on your dress after the fall?

A. I didn't pay any attention to it.

Q. In any event, you didn't notice anything?

A. No, all I wanted to do was get out of Safeway, it was an embarrassing thing to fall.

Q. Did Dr. Rotar prescribe the aspirin for you?

A. He told me to take it, yes.

Q. And did you ever take any liniment or anything like that? A. Rub it on?

Q. Pardon me? A. You mean liniment?

Q. Yes. A. Yes, sort of a heat.

Q. Did you ever apply any of that?

A. Yes. [79]

Q. And did Dr. Rotar prescribe that?

A. No, that was my own idea.

Q. That was your own? A. Yes.

Mr. Poore: I believe that's all.

(Testimony of Mildred Murphy.)

Redirect Examination

By Mr. Erickson:

Q. Just one or two questions. Miss Murphy, Mr. Poore asked you to estimate the distance in feet from the place where you fell to the spot where you first noticed the shininess, and I think your testimony was you first noticed it when you first went through the turnstile that is open, is that correct?

A. Yes, that's when I noticed it.

Q. And I think you said that the place where there had been a turnstile or was a turnstile was beyond the rail back of which the carts were parked, is that correct? A. Yes.

Q. So that whatever the distance is between that point and the point where you fell is the distance where you first noticed the shininess, is that correct? A. Yes.

Q. And you didn't make any measurements?

A. No, I don't know, I am just guessing as to the distance.

Q. Now, the question was asked you about whether your shoes [80] might have been wet and you testified this morning that when the car was parked, it was parked right by the the extreme southeast corner of the Safeway Store, is that correct? A. That's right.

Q. And you also testified that there was a canopy over the sidewalk? A. Yes.

Q. And can you say whether or not the canopy

(Testimony of Mildred Murphy.)

extends right up to the edge of the building, that is, the east edge? A. Yes.

Q. And the canopy that is there now is the same one that was there on that date? A. Yes, it is.

Q. And you testified that you walked around the car and came under the canopy. Was it raining at that time? A. Not at the time.

Q. Did you have an umbrella? A. No.

Q. Were you wearing a hat? A. No.

Q. Now you and I drove by Safeway Store this morning, did we not? A. Yes.

Q. And did you observe whether or not there was gravel where your car was parked, and around in back of it? [81] A. There was.

Q. Can you say whether or not that was the same circumstances when you——

A. Yes, there was gravel.

Q. And is it your testimony now that your shoes were not wet?

A. Well, I don't see how they could be.

Q. Now, the question was asked you concerning whether you said to Rose Ledingham that you fell because your shoes were wet, and you say there was no such conversation?

A. There was no conversation. I didn't feel like talking.

Q. Were you conscious? A. Yes.

Q. So, if you had said it, you would remember it? A. I would remember.

Mr. Erickson: That is all.

The Court: Anything further, Mr. Poore?

(Testimony of Mildred Murphy.)

Mr. Poore: May I just take a minute, your Honor?

The Court: Yes. Well, let's take a recess until 3 o'clock. (Jury admonished.) Court will stand in recess until 3 o'clock.

(10-minute recess.)

Mr. Erickson: I find that in the recess I thought of a question or two, your Honor, also.

The Court: Very well.

Q. (By Mr. Erickson): You were asked by Mr. Poore about [82] whether you said something to Rose Ledingham to the effect that your shoes were wet, and you say there was no such conversation. Do you recall what the conversation was in the car, if any?

A. She just said, "What hospital do you want to go to," and I said, "St. James."

Q. Now, you said at St. James she said you should go back to Safeway, and you did not go back. Was there any other conversation in the hospital?

A. She said to me that Safeway went good for this.

Q. What was she referring to?

A. I guess the expenses.

Q. But those bills have not been paid for?

A. No.

Q. You paid Dr. Rotar? A. Yes.

Q. And the hospital bill is still due?

A. Still due.

Mr. Erickson: That is all.

(Testimony of Mildred Murphy.)

Recross-Examination

By Mr. Poore:

Q. May I ask you if we can measure the bottom of your heel, too, on this, Ma'am? Would you mind stepping over here, too, Mr. Erickson, to see if I got this right. Your heel slopes [83] down to approximately five-eighths of an inch, is that roughly accurate?

A. I don't know, I never measured it.

Mr. Erickson: Shall we make it three-quarters?

Mr. Poore: All right, fair enough, three-quarters.

Q. And it is roughly round?

A. I guess so.

Mr. Poore: That is all.

Mr. Erickson: That is all.

The Court: You may step down, call the next witness.

(Witness excused.)

DR. HOWARD M. CLEMMONS

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Please state your name, Doctor?

A. Howard M. Clemmons.

Q. What is your profession, Doctor?

(Testimony of Dr. Howard M. Clemmons.)

A. Orthopedic surgery.

Q. And where do you practice?

A. In Butte, Montana.

Q. And how long have you practiced here?

A. Since 1951. [84]

Q. Now, what does being an orthopedic surgeon involve?

A. The requirements are graduation from a medical——

Q. May I interrupt? What is the specialty, orthopedic surgeon, what does that mean?

A. Well, it is referred to as that branch of the healing art which deals with diseases, deformities, injuries of bones and joints and associated structures, and those associated structures are the muscles, ligaments, tendons, nerves, blood vessels, and so forth.

Q. And those are the muscles, nerves, ligaments that are attached to the bony skeleton, the bony part of the body, is that it, in general?

A. Well, associated with the bony skeleton, yes.

Q. And your practice is limited to and you specialize in that particular field of medicine, is that correct? A. That's correct.

Q. Now, will you tell the Court and jury, doctor, what your training has been and your qualifications for specializing in that field?

A. The Board of Standardization requires graduation from a medical school approved by the American Medical Association, followed by an internship in a hospital approved by the Council on Postgradu-

(Testimony of Dr. Howard M. Clemmons.)

ate Medical Education of the American Medical Association, and following that, a minimum of three years of postgraduate training in orthopedic surgery. I had [85] four years postgraduate training. One year was spent with three orthopedic surgeons in Omaho, Nebraska. Following that I served a fellowship at the Guthrie Clinic and Robert Packer Hospital in Sayre, Pennsylvania, of a year and a half, and following that a fellowship in orthopedic surgery at the Leahy Clinic and affiliated hospitals in Boston, Massachusetts. After completion of one year of postgraduate training, we were then eligible for examination in what they call part one of the Boards, which I completed in New York City, in May, 1948. After the completion of the academic training in the aforementioned institutions, and upon completion of two years practice in the specialty field, the applicant is then eligible for the part two examination, which are given in Chicago, which I took on January 23, 1954, and the examining board is composed of specialists in the field of orthopedic surgery who are professors and teachers in teaching institutions and various colleges in the United States.

Q. And did you take that examination and successfully pass it?

A. That's correct, and they issue you a certificate showing that you are then certified by the specialty board as eligible to call yourself a practitioner in that field.

Q. In the field of orthopedic surgery?

(Testimony of Dr. Howard M. Clemmons.)

A. That's correct.

Q. And do you belong to any organizations or societies limited [86] to orthopedic surgeons?

A. Yes, sir, after the board examinations are completed and the candidate is successfully certified, he then is eligible for fellowship in the American Academy of Orthopedic Surgeons.

Q. And are you a member of that?

A. That's correct, and also a member of the Western Orthopedic Association.

Q. How long have you practiced here in Butte, Doctor? A. Since 1951.

Q. And I believe we didn't get the name of the college or university or medical school from which you secured your original M.D.

A. The University of Nebraska College of Medicine located at Omaha, Nebraska.

Q. Do you have other academic degrees besides the M.D.?

A. A Bachelor's Degree from the University of Omaha.

Q. Now, how long have you practiced in Butte?

A. Since January, 1951.

Q. And has your practice been limited to orthopedic surgery? A. Yes, sir.

Q. And as an orthopedic surgeon, do you perform operations, surgery in your field?

A. That is correct.

Q. And in addition to your practice here in Butte, do you [87] also serve in some capacity in connection with a hospital in Helena?

(Testimony of Dr. Howard M. Clemmons.)

A. All the staff affiliations, you mean?

Q. Yes.

A. I am on the staff of St. Johns Hospital in Helena, St. Peters Hospital in Helena, and Shodair Hospital in Helena.

Q. And you are on the staff at St. James here?

A. Yes, sir.

Q. And any other hospital?

A. St. James and Community Hospital here.

Q. And the Shodair Hospital at Helena is the hospital for crippled children, is that correct?

A. That is correct.

Q. And do you do the orthopedic surgery at that hospital?

A. I am one of the orthopedic surgeons at the hospital, yes.

Q. And your experience has been extensive since 1951, or not, as an orthopedic surgeon in Butte and the surrounding territory, and particularly in Butte and Helena?

A. I have limited my practice to orthopedic surgery.

Q. Now, were you asked by me to examine Miss Mildred Murphy, the plaintiff in this action?

A. Yes, sir.

Q. And did you make an examination of Miss Murphy? A. I did. [88]

Q. Now, before you tell us about that examination, Doctor, will you give to the Court and jury an idea of what your procedure is when you examine a

(Testimony of Dr. Howard M. Clemmons.)

person in some manner connected with orthopedic surgery or diagnosis?

Mr. Poore: If the Court please, prior to getting into this phase of his testimony could we ask a question or two on the qualifications of the doctor?

Mr. Erickson: Yes, I have no objection, your Honor.

The Court: Proceed.

Mr. Poore: Doctor, did you ever prescribe for or treat Miss Murphy?

The Court: Well, that doesn't have anything to do with his qualifications as an expert, does it?

Mr. Poore: I believe it does, your Honor.

The Court: Well, I don't understand that it does. Do you object to the question?

Mr. Erickson: I do.

The Court: Sustained.

Mr. Poore: We will reserve the questions until cross-examination.

The Court: Of course, it may have something to do with reference to the kind of testimony that he can give. In other words, a treating doctor is at liberty to testify to things other than an examining doctor for the purpose of testifying. [89]

Mr. Poore: Then may we renew the examination along those lines?

Mr. Erickson: I haven't asked him any questions yet.

The Court: No, you haven't, you are just offering him as an expert?

Mr. Erickson: That's right.

(Testimony of Dr. Howard M. Clemmons.)

The Court: Very well, go ahead. You can make an objection based upon the fact that he has never treated her, that he has just examined her as a doctor examining her for the purposes of testifying.

Mr. Poore: May that be stipulated that the doctor has never examined her for the purposes of treatment, but merely for the purpose of testifying?

Mr. Erickson: I am not sure, never having asked the doctor the question. He has examined her once since the original examination, and I don't know. Anyway, Mr. Poore is so co-operative and I don't like to see him unco-operative, your Honor, but I don't believe the question is proper at this point.

The Court: At this point. Continue, sustained, go ahead.

Q. (By Mr. Erickson): Now, the last question was your general procedures that you use when you are examining a person referred to you for an orthopedic examination?

The Court: May I suggest that he not list the procedures that are generally used. Let's have him just list the procedures [90] that were used in this case, because then we will have to go through that all over again.

Mr. Erickson: Very well, your Honor.

Q. Now, did you examine Miss Mildred Murphy?

A. Yes, sir.

Q. Have you the report of your examination there? A. Yes, sir.

Mr. Erickson: And the copy of that report, your

(Testimony of Dr. Howard M. Clemmons.)

Honor, has been delivered or served upon counsel, so that the report has been made available.

Q. The report is dated November 26, 1958?

A. That's correct.

Q. What date did you examine Miss Murphy?

A. On November 14, 1958.

Q. And the report that you now hold in your hand was the report given to me, is that correct, was that the result of your examination?

A. This is a copy of that report, yes, sir.

Q. And how soon after the examination was the report prepared? A. Within 24 hours.

Q. And does the preparation of this report follow your general practice? A. That's correct.

Q. In reducing your memoranda or your notes to writing in [91] the form of a report?

A. I should say that is the time I dictate the report. The date on here is the date my secretary transcribes the report and sends it out.

Q. And when you make your original examination, in this case, for example, the examination was on November 14th, but you would not have available on that date the entire results of your tests, is that correct? A. That is correct.

Q. And your X-rays?

A. That's right, the X-rays are not dry.

Q. Now, if you will refer to your report, will you give the jury the history that was given you by Miss Murphy at the time she came in for examination?

A. She told me that she had slipped on a slippery floor in the Safeway Store on East Granite Street

(Testimony of Dr. Howard M. Clemmons.)

on the 24th of June, 1958, about 10:30 in the morning.

Mr. Poore: Now, if it please the Court, we object to this line of testimony upon the ground and for the reasons that the doctor is not the attending or treating physician, and that as such this is a declaration of self-serving heresay declarations and is inadmissible.

The Court: Sustained.

Mr. Erickson: May it please the Court, I hope the Court will reserve ruling on it. I have a case and I have it with me, [92] but I have been trying to find it in which the appellate court has ruled that for the purpose of showing the basis for the doctor's examination and the background, and I believe it is the universal rule, this history may be given. However, the jury should be admonished, and I haven't prepared an instruction on it, but I will do it, that that history is not any proof of whether the accident occurred or did not occur, but I believe the rule, your Honor, is that——

The Court: Well, give me the authority. I will have to rule on it now, I can't take any time with it. I'll take a look.

Mr. Erickson: I don't believe I can find it immediately, your Honor, and I would hope that I may be permitted to submit the authority later.

The Court: And reopen the question, but in the meantime I will have to sustain the objection.

Q. Will you turn now to your section of your report, Doctor, entitled "Examination," and will

(Testimony of Dr. Howard M. Clemmons.)

you tell about the actual examination of Miss Murphy?

A. The examination revealed tenderness to palpation, that is, to touching and feeling, along the base of the skull, and of the long strap muscles at the back of the neck. Motions of the neck were diminished about 50 per cent normal in lateral or sideward bending, each left and right, and in rotation, which is when they swing the chin to either side. Forward [93] and backward motions of the neck were normal. There was some tenderness, however, in the extremes of both flexion, that is the forward bending and backward bending of the neck.

Q. Now, when you say that, are you referring to the motion of which she is capable in the extremes of 50 per cent, is that what you are referring to there?

A. That is correct. Now, there was tenderness to touching and feeling two of the muscles, one of which is called the splenius capitis and the other the trapezius. They are muscles located at the back and side of the neck. I will merely relate the positive findings.

Q. Now, when you refer to a positive finding in medical terminology, if you find nothing unusual, that's a negative?

A. That's normal or negative. Positive findings mean abnormality.

Mr. Poore: Prior to the doctor's answering this question, may we ask a question directed to the

(Testimony of Dr. Howard M. Clemmons.)

foundation for this particular question, this line of testimony?

The Court: No; if you have an objection to him testifying, why make it.

Mr. Poore: We object to further testimony from the witness upon the ground and for the reason that no proper foundation has been laid, and it appears that the doctor is not the attending or treating physician, and in testifying as to subjective symptoms, he is basing his opinion upon [94] self-serving hearsay declarations by this particular plaintiff to the doctor.

The Court: Well, it doesn't appear that he is making answers based upon the self-serving declarations—are these findings made upon your observations of the movements that could be made and can be made?

A. Yes, sir.

The Court: It didn't depend upon what she told you?

A. No, sir.

The Court: It just depended upon your examination and manipulation and what you could observe?

A. That's correct, your Honor.

The Court: Proceed.

A. Motions of the lumbar spine, that's the lower portion of the spine, were limited to about 25 per cent of normal in sideward bending, that is each left and right, and on forward bending. There was tightness and rigidity of one of the strap muscles

(Testimony of Dr. Howard M. Clemmons.)

of the back. Those are muscles that parallel the spine up and down and lie on either side of the center of the spine.

Q. How could you tell there was rigidity?

A. By touching it and feeling it. There was an increase in what is known as lumbar lordosis, or more commonly as swayback. Everybody has some swayback within normal limits, but hers was markedly increased. The straight leg raising [95] test which is performed with the patient lying on the back and the knees straight, the examiner lifts the leg this way (indicating). The test is known simply as the straight leg raising test, and it caused discomfort in the lumbosacral area. However, there was no evidence of sciatica or sciatic nerve involvement.

Q. Now, did you make an X-ray examination of Miss Murphy? A. Yes, sir.

Q. Will you go ahead and tell us about that?

A. Well, the report of the X-ray examination is on the written report. Front and side views of the skull were taken and showed no abnormality. Front and side views of the neck, cervical spine, were made and showed a decrease in the joint space between the fifth and sixth cervical vertebra.

Q. Do you have with you, Dr. Clemmons, the X-ray or X-rays that were taken of the skull and of the cervical spine? A. Yes, sir.

Q. You have those convenient there?

A. Yes, sir.

The Court: You may have those marked.

(Testimony of Dr. Howard M. Clemmons.)

The Witness: The skull didn't show anything. It is normal—my X-ray for that shows.

Q. You testified that in addition to X-rays of the skull you also took X-rays of the cervical spine, is that correct? A. That's correct. [96]

Q. And the cervical spine is that portion of the spine of the upper end of it, isn't that true?

A. That's right, from the bottom of the skull to the area between the shoulders. The neck is the cervical spine.

Q. And you have two X-rays, or one X-ray taken of Miss Murphy on November 14, 1958, is that correct? A. That's correct.

Q. One?

A. Well, this one shows the pathology.

Q. Very well.

Mr. Erickson: May we have this X-ray marked as Plaintiff's proposed exhibit No. 1?

Q. Dr. Clemmons, showing you the X-ray which has been marked Plaintiff's proposed Exhibit 1, is that an X-ray picture taken on November 14, 1958, of Mildred Murphy? A. It is.

Q. And is that a part of your regular files?

A. Yes, sir.

Q. That are kept in connection with the examination of Miss Murphy?

A. That's correct.

Q. And the X-rays were taken in your office?

A. That's right.

Q. And did you see the X-ray immediately after it was developed and processed? [97]

(Testimony of Dr. Howard M. Clemmons.)

A. Yes, sir.

Q. Now, if you will——

Mr. Erickson: I believe I will offer the X-ray at this point, your Honor.

Mr. Poore: May we ask the witness a question?

Mr. Erickson: Yes.

Mr. Poore: Does this truly and accurately portray the area of Miss Murphy's body it is intended to portray?

A. Yes, sir.

Mr. Poore: No objection.

The Court: What is it, No. 1?

Mr. Erickson: Yes.

The Court: It is admitted.

(Plaintiff's Exhibit 1 here received in evidence.)

Q. (By Mr. Erickson): Now, Doctor, I wonder is there another one taken of the cervical spine at the same time?

A. There is another view taken at the same time.

Q. It shows nothing significant as far as the examination is concerned? A. No, sir.

Q. Now, Doctor, I wonder if you would use your gadget here and explain to the Court and jury what that X-ray shows?

Mr. Poore: If the Court please, we will renew our objection to the admission of this testimony unless by proper foundation it is shown that this opinion of what is shown by [98] this X-ray is not

(Testimony of Dr. Howard M. Clemmons.)

based in whole or in part upon any testimony given to the doctor by Miss Murphy.

The Court: Well, Doctor, you are limited to pointing out what the picture shows.

A. Yes, sir.

The Court: Proceed.

Q. (By Mr. Erickson): Now, referring to Exhibit 1, Doctor, which is the X-ray of one view of Miss Murphy's cervical spine, will you point out to the Court and to the jury what that exhibit shows?

A. This is a side view. This extremely dense or white portion of the shoulder area at the bottom of the film on the upper left-hand corner is the jawbone. There is the back of the skull in the upper right-hand corner. There are seven cervical vertebrae normally, that is, seven vertebrae between the skull and the shoulder, 1, 2, 3, 4, 5, 6, and here's a portion of the 7th (indicating). Now, you will notice there are spaces between the vertebrae. Between 2 and 3 and 3 and 4 and 4 and 5, they are of nearly the same width. That black space between each of the vertebrae is occupied by a less dense substance than bone, it is occupied by cartilage, and that is why it appears blacker on the X-ray, and that cartilage is known as the intervertebral discs, and they are to the human body what the shock absorbers are to an automobile or a mechanical contraption. You will notice that there [99] is a markedly decreased space between the fifth and sixth cervical vertebrae.

Q. Doctor, in connection with that last observa-

(Testimony of Dr. Howard M. Clemmons.)

tion, would you assume and expect, on the basis of your examination of other persons and your experience as an orthopedic surgeon, that the intervertebral space would be the same in the area you have marked between those two vertebrae as in the others above it, in the normal circumstance?

A. It should be approximately the same width or thickness, yes, normally.

Q. So if the thickness is less than the normal, that would represent an abnormality, is that correct?

A. That's right; it would mean that there was something wrong with that particular intervertebral disc. You will further notice that there is a notch in the front and top side of the body of the sixth cervical vertebra. You will notice on this vertebra (indicating), and the one below it, that the vertebra beaks down, it has a little beak on it. You will notice that this vertebra (indicating) is flat. You will notice that this notch would fit this particular portion (indicating). This has every indication from the X-ray appearance alone, and not based on any past history, or any other findings, of an injury, of a fracture of the cervical spine, or in common parlance, a broken neck.

Q. Now, Doctor, in relation to that particular X-ray, and [100] based upon your qualifications as an orthopedic surgeon, assuming that Mildred Murphy had had no trouble with her cervical spine and no pain in the neck, and that she went into the Safeway Store on Granite Street here in Butte, and

(Testimony of Dr. Howard M. Clemmons.)

walked onto the floor, and her feet shot out from under her, and she landed on her back, first on the lower spine, and finally with her head cracking hard against the floor, and assuming that immediately she felt a pain in her neck in the area indicated as the area where the intervertebral disc is reduced in size, and assuming that that pain has continued to date, can you say in your opinion whether or not such a fall under the circumstances that have been assumed could have caused the reduction in the intervertebral disc area, and the broken neck or the fracture that you spoke of?

A. Assuming those things to be true, it could have easily caused such a thing, yes.

Q. Now, Doctor, is there anything else on that X-ray that we laymen, our attention should be called to, indicating whether or not there is an abnormality of any kind?

A. No, sir; those are the only pathological findings.

Q. Thank you. Now, Doctor, if you will—may I ask you one more question? Is there any indication of any arthritic change in the X-ray you have just shown of the cervical spine?

A. That particular area there is often referred to in writing X-ray reports, I mean the appearance of such an area, [101] as an arthritic change, but here again, it is localized, and should be differentiated from the so-called chronic arthritis of aging.

Q. Now, in connection with this picture, Exhibit 1, would you differentiate between an arthritic

(Testimony of Dr. Howard M. Clemmons.)

change and a change that comes from trauma or injury as we have here?

A. Well, if I were to see those changes throughout her neck on the X-ray, I would conclude that those were chronic arthritic changes. Since it is localized to this area, I conclude that it is a traumatic arthritis, that is, the same changes have come about, but were produced locally in one place by an injury.

Q. And when you speak of trauma, you speak of an injury, that is, in medical terminology, and it could be the breaking of a leg or a cut or anything of that kind, is that correct, when you speak of trauma?

A. That's right; trauma is a general word meaning injury.

Q. And from an examination of the X-ray, whether it is characterized as arthritis or something else, the result would still be the same, in your opinion, an examination of the X-ray indicates an injury or trauma, is that correct?

A. That's correct.

Q. Now, if you will go back to your report again, Doctor. You have described Exhibit 1, and some mention is made in your report of some irregularity of the supero anterior aspect of [102] the body of C6. Now, has that already been covered in your description, is that the break?

A. That's the irregularity that was described, yes, sir.

(Testimony of Dr. Howard M. Clemmons.)

Q. Now, will you go ahead with your report from there, Doctor?

A. X-rays of the dorsal spine were also made, front and side views. That's the area of the spine between the shoulders and the waist, approximately, and some minimal arthritic changes were found throughout that area. They were generalized.

Q. And it is true that generally people of the age of 50 or over will show some arthritic changes, or is that, or is that not true?

A. Well, it's not necessarily true, but if they do show changes and they are generalized, it is consistent with the aging process.

Q. But in the case of the cervical spine, when you found it only in connection with the two vertebrae, 5 and 6, as you have already testified, in your opinion, that would not be the arthritis of aging, is that correct?

A. That's correct; it is the localized arthritis seen after an injury. X-rays of the lumbosacral spine—that's the portion from the waist to the pelvis—were made, and I always take three pictures, one front, one side view, and then a detailed shot to show a side view of the last joint there, the lumbosacral joint. It also shows the lumbosacral angle, that is [103] the angle between the body of the fifth lumbar vertebra and the sacrum. Normally there is an angle of about 30 or 35 degrees. However, X-rays taken of this lady showed an increase in that angle. In addition to that, there was a de-

(Testimony of Dr. Howard M. Clemmons.)

crease in the joint space between the fifth lumbar vertebra and the sacrum.

Q. Do you have the X-ray showing that with you, Doctor? A. Yes, sir.

Q. Now, I have had marked, Doctor, an X-ray as Plaintiff's Proposed Exhibit 2, and this is one of the X-rays taken when you examined Miss Murphy on November 14, 1958, is that correct?

A. That's correct.

Q. And it shows what, generally, the lumbar region?

A. Well, it shows a part of the 3rd lumbar vertebra, the 4th, the 5th, and the upper portion of the sacrum, the lumbrosacral joint, and the angle.

Q. And it's a true representation of what her condition was on that date, is that correct?

A. That's correct.

Mr. Poore: No objection.

Mr. Erickson: We offer Plaintiff's Exhibit No. 2.

The Court: It is admitted.

Q. Now, Doctor, if you would be good enough to put this on your viewing screen and explain what that shows to the Court [104] and jury?

A. This is a side view taken to show the lumbosacral joint and angle. This little——

Mr. Erickson: Could you speak just a little louder, Doctor?

A. This little building block structure here (indicating) is the third lumbar vertebral body. This is the 4th, 5th, and this is the sacrum (indicating). If we were to draw a line——

(Testimony of Dr. Howard M. Clemmons.)

Q. Could you tell the jury, Doctor, what the sacrum is, where we are in the human anatomy when we talk about those things?

A. The sacrum is the broad, flat, triangular bone about waist high and a little lower between these two pelvic bones which you feel when you stand. Have you got a pencil? This is the upper portion of the sacrum (indicating), this is the 5th lumbar vertebral body. Now, if we were to place a line parallel with the front and the back of the 5th lumbar vertebra, and draw another line parallel with the sacrum, we would see that there was approximately 70 degrees angulation. The normal angle is about 35. In other words, there is an increase in the swayback. In addition——

Q. You spoke of the lordodic or lordosis curve, is that what originates the lordosis curve?

A. That's right; it's a lumbar lordosis. There is also a [105] cervical lordosis, but now, if we look at the spaces between the bodies, you will notice that the space between the lower aspect of the front of the body of the 5th lumbar vertebra, and the front or top portion of the sacrum is quite wide, but as we go back, follow these lines (indicating), the back portion of the space between the 5th lumbar and the sacrum segment is markedly decreased. This space—that's why it appears blacker on the X-ray—is known as cartilage, and is known as one of the intervertebral discs. That I consider an abnormality.

(Testimony of Dr. Howard M. Clemmons.)

Q. And why is it abnormal in this particular instance, because of the reduced space?

A. Well, first because of the reduced space there, and the increased angulation.

The Court: Let me ask a question, Doctor. Does that reduced space at the—what do you call it?

A. The lumbosacral joint space.

The Court: Well, it is reduced at one place and expanded at another, isn't it?

A. That is true. It is held taut here (indicating) by a ligament.

The Court: Well, all that that indicates is that there is a difference in the angulation between the lumbar spine and the sacrum, is that all that it indicates?

A. Yes. The X-ray man, having never examined the patient [106] clinically would give you a report, increased lumbosacral angle, decreased space between L5-S1.

Q. (By Mr. Erickson): Now, in connection with that particular decreased space, and based on your study and the fact that you qualified as an expert, and your experience in other cases, would you say that that is or is not a normal condition insofar as that condition is concerned?

A. It is not normal, it is abnormal.

Q. And why is it abnormal, the increased—decreased space?

A. Increase in the angle between the sacrum and the lumbar spine throws a strain on that joint, with or without injury, and the pressure exerted

(Testimony of Dr. Howard M. Clemmons.)

by the sacrum at that angle, because of the strain exerts greater pressure on the intervertebral disc at that level.

Q. Do you have other X-rays showing and illustrating this same point of the change in the intervertebral space between the 5th and 6th lumbar vertebrae, or between the lumbar and sacrum, I guess it is?

A. Yes; I have another view, or I should say another film of the same view of the same patient taken April 7, 1959.

Q. Well, I want to restrict it now to this particular examination. This is the only one you have on the November 14, 1958, examination?

A. That's right.

Q. Now, Doctor, assuming that Mildred Murphy complains of a [107] low back pain in the general area indicated on the film, and is that between the 5th and 6th, or the 6th and the sacrum?

A. Well, between the 5th lumbar and the sacrum.

Q. And the sacrum. Assuming that Mildred Murphy complains of pain in that area, and an ache, could this condition, in your opinion, cause an ache or a pain? A. Yes, sir.

Q. Now, Doctor, assuming that Mildred Murphy had never had any trouble with any pain in the region of the lower spine, the area we are now talking about, and assume that she had, prior to June 24, 1958, worked as a waitress and been able to carry heavy trays and dishes, and assume further

(Testimony of Dr. Howard M. Clemmons.)

that she walked in the Safeway Store on that date on Granite Street, and that she walked in on the hard floor, which is an asphalt tile, I believe over concrete, and that her feet suddenly shot out from in under her so that her feet were in the air and she landed on her back, in your opinion, could the condition which you now find that is abnormal have been caused by such a fall?

A. Definitely, yes, sir.

Q. Now, do you notice any arthritic change in the particular lumbar area there? A. No, sir.

Q. So that that abnormality you see down there, you would not characterize it as an arthritic [108] change?

A. I see no evidence of any arthritis in that film.

Q. Do you have any other X-rays taken on November 14, 1958, on that examination of Miss Murphy?

A. Nothing that shows any significant changes.

Q. Well, I call your attention to your report where you say there appears to be some disturbance in the lumbosacral in the AP on the right side, which appears to be a fragment of bone.

A. Oh. Well——

Q. May I mark that, Doctor?

A. Yes.

Q. Showing you an X-ray marked Plaintiff's Proposed Exhibit No. 3, is this another one of the X-rays taken at the same time as Exhibits 1 and 2?

A. Yes.

Q. It is a true and correct representation of the condition of Miss Murphy? A. Yes.

(Testimony of Dr. Howard M. Clemmons.)

Mr. Erickson: We offer it.

Mr. Poore: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit 3 admitted in evidence.)

Q. Now, if you will explain what that shows to the Court and to the jury?

A. This is an AP view of the lower portion of the spine, which shows also the pelvic and hip joints. The 5th, 4th, 3rd, [109] 2nd and 1st lumbar vertebrae are seen, and the wide brim of the pelvic bone are seen on either side.

Q. Doctor, before you go further with that, your Exhibit 2 was of the same general area, but was a side view, is that correct?

A. That's correct; it was taken right through here (indicating).

Q. Now, insofar as the representation of the intervertebral space, with this view can you see anything that you consider abnormal so far as this view is concerned?

A. No; we don't take this view for that simply because we want a good look right through the joint space, and this doesn't give it to us.

Q. It wouldn't show the narrowing that was in Exhibit 2, is that correct?

A. It shows a false narrowing on anybody, simply because of the shape and the position of the bone.

Q. So that for the purpose of determining the extent of the abnormality, if any, of the interverte-

(Testimony of Dr. Howard M. Clemmons.)

bral space, you get that from a side view, and not from a front view, is that correct?

A. Correct.

Q. Now, if you will go ahead, Doctor?

A. Now, I call your attention to the 5th lumbar veterbra. This is marked with a lead marker before the film is exposed, [110] and this is a big "R," which stands for the right side of the patient's body. You will notice that right in here (indicating) is a white area that is not connected to the bone area around here (indicating). It is not quite triangular, but it is roughly triangular, and if you look closely at it, you will find that it differs in appearance from this bone right here (indicating). If you look closely at this (indicating), you will find little white lines that run through this bone, because this bone is more like a honeycomb. In that honeycomb, the holes in there are where the blood passes through. This is homogenous, amorphous, shapeless (indicating). These little white lines in there are called reticulations. Here there are no reticulations (indicating), so one, when looking at this film, would conclude that this formless mass is not bone, but it's calcium. Where did it come from? You don't see it over here (indicating). It might represent a fracture except for this homogenous consistency.

Q. Is that a normal thing you would expect to see in an X-ray? A. No; that's abnormal.

Q. Is there anything further on that particular X-ray?

(Testimony of Dr. Howard M. Clemmons.)

A. I can't draw any conclusion from that film alone.

Q. Now, Doctor, is there anything else from your first examination on these X-rays that we have not covered? [111]

A. No; I think we have covered it.

Q. Now, Doctor, you made another examination of Mildred Murphy, did you not? A. Yes, sir.

Q. And when was that made?

A. That was the 7th of April, 1959.

Q. And that is the report I have not yet seen, is that correct, Doctor? A. That's correct.

Q. Now, did you again give Miss Murphy a thorough examination and take X-ray pictures?

A. Yes, sir.

Q. Now, we will reverse the process, and I'll ask you to produce the X-rays taken on April 7th which covers this same area, the front view, the same as No. 3?

(Witness produces X-ray.)

Q. The X-ray has been marked for our identification as our No. 4, and it was taken on April 7, 1959, is that correct? A. Correct.

Q. At your office? A. Yes, sir.

Q. It is a part of your regular files?

A. Yes, sir.

Q. And is it a true representation of the condition of Miss Murphy, as demonstrated by that X-ray as of the date it was [112] taken?

A. It is.

(Testimony of Dr. Howard M. Clemmons.)

Mr. Erickson: We offer No. 4.

The Court: It is admitted.

(Plaintiff's Exhibit No. 4 received in evidence.)

Q. Now, Doctor, if you will, perhaps, keep both of these for the purposes of comparison, 3 and 4, and point out to the jury any significant changes which may or may not have occurred in the two X-rays?

A. Now, I asked you to look at this triangular area of calcium, and here it is in this one (indicating). Here is the same area on the other film (indicating) taken April 7, 1959, and it is no longer there.

Q. Now, do you draw any conclusion as an expert as a result of the presence of the calcium in November of 1958 and its absence in April of 1959?

A. Yes, sir.

Q. What is that conclusion?

A. First of all, it was not a fracture because of its shape and because of the fact it has disappeared. There was calcium, and it was probably calcification in a blood clot or hematoma, which is always of traumatic origin, due to injury.

Q. Now, Doctor, if you will resume the stand, would it be possible for a trauma to the intervertebral space between the 5th lumbar and the sacrum to produce a blood clot or an [113] embolism of any kind?

A. No. It would be possible for a fall or an in-

(Testimony of Dr. Howard M. Clemmons.)

jury to produce a blood clot in a muscle, which is the location of this little calcified area.

Q. Now, assuming again the same set of facts, Doctor, of Mildred Murphy going into the Safeway Store on June 24, 1958, and suffering the fall that has heretofore been described, can you say whether or not in your opinion the blood clot, or—what did you call it, embolism? A. Hematoma.

Q. Hematoma.

A. That's a fancy name for it, but it's just a blood clot within a soft tissue structure.

Q. In your opinion, could that have been suffered as a result of the fall heretofore described, assuming the fall occurred?

A. Yes, sir; it could.

Q. And in view of the fact that it disappeared in the six months period or the five months period, could you draw any conclusion as to how old the blood clot was, or the calcium deposit was in November, 1958, when you first discovered it?

A. No, sir; I couldn't.

Q. Well, could you say whether it was of relatively recent origin, or it might have been congenital or old?

A. Well, let's see, January, February, March, April, if it [114] disappeared within five months from the time I saw it on the first film in November, I would assume that it was approximately that old originally.

Q. Now, Doctor, was there anything further, Doctor, in connection——

(Testimony of Dr. Howard M. Clemmons.)

The Court: Pardon me, may I ask a question? Did I understand you that if it disappeared in the five months from November to April that in November is that it must have been at least five months old at that time?

A. That's correct.

Mr. Erickson: I believe his testimony was that it would have been about five months old, rather than at least.

A. Approximately, I mean I can't draw any specific conclusion as to the date and hour, but these things take from eight to 18 months to absorb.

Q. (By Mr. Erickson): And this one apparently absorbed in about five months, is that correct?

A. It's possible.

Q. Was there anything else, now, in connection with Exhibits 3 or 4, Doctor, that you want to call the jury's attention to, or that you should call the jury's attention to?

A. No; I think we have covered the important point on that X-ray.

Q. Now, Doctor, did you take some X-ray pictures of the lumbar spine on this examination on April 7, 1959? [115] A. Yes, sir.

Q. And you have an X-ray or X-rays covering that area? A. Yes, sir.

Q. And it was taken on April 7th of Miss Murphy, and it is a true representation of what the X-ray showed as of that time, is that correct?

A. That's correct.

Mr. Erickson: We offer Exhibit 5.

(Testimony of Dr. Howard M. Clemmons.)

Mr. Poore: No objection.

The Court: It is admitted.

Q. Now, Doctor, if you will take Exhibit 5, and I believe Exhibit 2 of the comparative area, and if you will tell the Court and jury what Exhibit 5 shows and then compare it with Exhibit 2?

A. These are views of the lumbosacral joint, the one on the right was taken November 14, 1958, and the one on the left April 7, 1959. It shows the increased angle, and, in my opinion, a decrease in the joint space, particularly at the back, between the 5th lumbar vertebra and the sacrum, as compared with this view (indicating). It is a progressive change.

Q. In other words, the situation hasn't remained static, but the amount of the lordosis or lordodic curve and the angle has changed, is that correct?

A. Not so much a change in the angle as a change in the [116] joint space, which has decreased.

Q. Now, would you expect normally to see in a period of five months a change in a normal spine in the amount of the space, the intervertebral space?

A. Not without some element being introduced, and that element is usually trauma or injury which brings about a change like that.

Q. Now, in a case where the intervertebral disc has been reduced where the reduction is due to injury or trauma, explain to the Court and jury how that operates? Is it an immediate change, or is it a gradual change?

(Testimony of Dr. Howard M. Clemmons.)

A. There is usually a gradual change. For example, in cases of injury to an intervertebral disc where we take X-rays on the same day of the injury or a day or two following, we usually don't see any change on X-ray. It is a few months later that we begin to see a decrease in the joint space, as there is a wear and tear produced on the injured disc. It degenerates, it wears out.

Q. Now, assuming, Doctor, the same question that we have asked before that Mildred Murphy had no trouble with her back, lower back, and she worked and carried trays, and she suffered the described fall, and having in mind these two X-rays, can you give your opinion whether or not this progression or retrogression would be possible as a result of the injury that occurred in that fall that occurred on June [117] 24, 1958?

A. Yes, sir; it would be possible.

Q. Can you say, Doctor, from your experience whether or not a decreased space in a situation like that shown in these two X-rays, 2 and 5, could cause pain and discomfort to the person who had that condition? A. Yes, sir; they usually do.

Q. And can you say whether or not that sort of a situation that we see between the 5th lumbar and the sacrum would disable a person from doing heavy work, and, more particularly, disable a person from carrying heavy trays?

A. Yes, sir; it would.

Q. Now, with relation to that situation would you say that Mildred Murphy's spine in that area

(Testimony of Dr. Howard M. Clemmons.)

is worse or better now than it was in November, 1958? A. It is worse.

Q. In your opinion, Doctor, as an expert, can you say whether that condition will or will not progressively get worse?

A. I can't say with any degree of prophecy, but based on past experience, when I see a change this marked that is progressive within this length of time, I would look forward to seeing it get worse as time goes on.

Q. Now, this is not the same as a ruptured intervertebral disc, is it? [118] A. No, sir.

Q. It is an entirely different thing?

A. That's right.

Q. Is there anything else on Exhibit 5 and Exhibit 2 that should be called to the jury's attention? The doctor will understand, as will the Court, that this is not a field that I as a lawyer know a lot about, and I have to depend upon the doctor to point out any significant facts.

A. No, sir; I think we have covered that.

Q. Now, in addition to this last X-ray, which was No. 5, did you take on April 7th any X-rays of the cervical spine? A. Yes, sir.

Q. And do you have that X-ray with you?

A. Yes. Mark it right up there, and I think we will be safe.

(Witness produces X-ray.)

Q. This X-ray which we will have marked for identification as Plaintiff's Exhibit 6 was taken on

(Testimony of Dr. Howard M. Clemmons.)

April 7th of 1959? A. Yes, sir.

Q. It is a part of your files?

A. Yes, sir.

Q. And it is a true representation of the condition of Mildred Murphy, as shown by the X-ray?

A. Yes, sir.

Mr. Erickson: We offer Plaintiff's Proposed Exhibit No. 6. [119]

Mr. Poore: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit 6 here received in evidence.)

Q. Now, Doctor, if you will take Exhibit 6 together with Exhibit 1 and point out to the Court and jury any significant matter shown by those exhibits?

A. These are both side views of the neck. The one on the left is the one taken November 14, 1958, and the one on the right was taken April 7, 1959. Now, you will notice this beak-like projection from the body of the 5th cervical vertebra. There is a whiter, denser line than there is across here (indicating).

Q. The first one you are referring to is the Exhibit 6, is that correct.

A. That's right. There has been a little further change in the appearance of the lower and front side of the body of the 5th cervical in the last film as compared with the first, about some five months difference.

(Testimony of Dr. Howard M. Clemmons.)

Q. And what does that indicate to you, Doctor, as far as the progress or lack of progress being made by Mildred Murphy insofar as that area is concerned?

A. Well, that density is usually caused by impingement, that is, when one bone abnormally rubs up against another one, it builds up that denser bone, and it appears whiter on the X-ray, so I would say that irritation was the factor. [120]

Q. And would you say from your examination of those two X-rays, and as an expert in the field whether or not the situation is worse or better now, that is worse in April than it was in November?

A. By X-ray it is slightly worse in appearance now than prior.

The Court (Jury admonished): Court will stand in recess until 4:15.

(Ten-minute recess.)

Q. Dr. Clemmons, is there anything else on any of these X-rays that needs to be pointed out in addition to what you have pointed out specifically?

A. No.

Q. Now, Dr. Clemmons, assuming the same state of facts we have assumed before, that is Mildred Murphy on June 24, 1958, walked into Safeway Store on Granite Street in Butte, and as she walked in on the hard floor, her feet shot out from under her, and she landed flat on her back and her head hit down on the floor, and a bump immediately developed, and that before that time she had no

(Testimony of Dr. Howard M. Clemmons.)

trouble with her neck or her back, are there any of the abnormalities on these X-rays, in your opinion, that could not have been the result of the fall under the circumstances related? A. No, sir.

Q. It is your opinion, then, that all of these abnormalities [121] you mentioned, the breaking of the neck, and the injury to the lower spine, all of those could have been caused by a fall such as I have described, is that correct?

A. That's right.

Q. Now, Doctor, assuming that Mildred Murphy, in this fall, which we have described, hit the back of her head violently upon the floor, the hard floor, and immediately a large lump was raised, and assuming that thereafter for several days she suffered from a severe throbbing headache, and assuming that she was hazy and nauseated and vomited, and assuming now that the headaches, while not of the same kind, not the throbbing kind, but periodic headaches, headaches which she did not have before June 24, 1958, as an expert, have you an opinion as to whether or not such a blow could be the cause of the continuing headaches? A. Yes, sir.

Q. What is your opinion?

A. It is my opinion that such a blow could be the cause of the headaches.

Q. Is there a medical term to express that idea?

A. Yes, sir; it goes under the name of post concussion syndrome.

Q. And what is a syndrome?

A. Well, that syndrome is a symptom complex,

(Testimony of Dr. Howard M. Clemmons.)

or a group of related symptoms. In this case that you describe, headache, [122] hazy, dizziness, nausea, vomiting and protracted headaches would be the symptoms.

Q. Now, Doctor, considering all of the abnormalities that you have pointed out in the X-rays, have you an opinion as to whether Mildred Murphy could go back to her former occupation of waitress, a job with which you would be familiar as a part of your common experience, but a job involving the carrying of heavy trays raised up on one hand, or carried in two hands, or heavy dishes? Have you an opinion as to whether she is physically able in view of these abnormalities to do that?

A. Yes, sir.

Q. What is that opinion?

A. It is my opinion that she is unable, in view of these abnormalities, to pursue that type of work.

Q. Now, based on these examinations, have you an opinion as to whether or not she will in the future be able to do that kind of work?

A. Yes, sir.

Q. And what is that opinion?

A. We have seen progression of the findings on X-rays, and with that in mind, it is my opinion that her condition will become progressively worse, and she will not be able to do that kind of work.

Q. So any employment that would require the carrying of trays [123] or heavy dishes, it is your opinion that she will not be able to do that, is that correct? A. That's correct.

(Testimony of Dr. Howard M. Clemmons.)

Q. And so far as that kind of work is concerned, she is, in the usual sense of the words, totally disabled, is that correct? A. That's correct.

Q. Now, Doctor, based on your examination, have you an opinion as to whether further medical treatment and care will be necessary for Mildred Murphy in the future? A. Yes, sir; it will.

Q. And have you an opinion as to whether that will be over a long period of time?

A. It probably will.

Q. And do you have any opinion, or can you make an estimate based upon your examination and on your own experience as a doctor, and knowing generally the medical profession, have you any opinion as to what the probable cost of the future medical attention she may require will be?

A. That would depend on how extensive the treatment was, and I have no way of looking into the future. It would also depend upon whether surgery was ever necessary.

Q. Well, from your examination, is there any opinion on your part that surgery might in the future be required?

A. It might possibly be on the lower back, [124] yes.

Q. And what would the nature of that surgery be?

A. Probably an exploration of that lumbosacral intervertebral joint space to see if there was encroachment on the nerve roots by disc material, followed by a spinal fusion, that is, an operation to

(Testimony of Dr. Howard M. Clemmons.)

graft in bone to prevent motion between the last lumbar vertebra and the sacrum.

Q. And if such an operation was necessary, would you have an opinion as to what the probable cost would be, the medical end and the hospital?

A. Oh, I suppose about $1,500.

Q. And in the absence of the more radical treatment of surgery, the treatment would be a continuation of drugs and rest and that sort of thing, would that be the normal procedure? A. Yes, sir.

Q. And if that procedure were followed, do you have an opinion as to what the probable cost in the future will be to Miss Murphy for treatment?

A. Well, it might run as high as 2 or $3,000. That's an estimate.

Q. Yes; I understand that. A. Yes.

Mr. Erickson: I believe that's all. [125]

Cross-Examination

By Mr. Poore:

Q. Doctor, prior to your examination of Miss Murphy in November, 1958, had you ever treated her? A. No, sir.

Q. Never known her at all in the relationship of doctor and patient? A. No, sir.

Q. In your examination of her in November, 1958, as I understand it, it was at the request of Mr. Erickson? A. That's right.

Q. And your report of examination was to Mr. Erickson? A. That's correct.

(Testimony of Dr. Howard M. Clemmons.)

Q. And you didn't at that time endeavor to treat Miss Murphy?

A. She was under treatment by another doctor.

Q. All right, but as far as you were concerned, you did not endeavor to treat her at that time?

A. I wasn't asked to by the other doctor, which would have been the only condition under which I would have accepted the case.

Q. Nor, in your examination on April 7, 1959, that was not directed to any treatment of the patient yourself? A. No, sir.

Q. So would it be correct, Doctor, that your examination was [126] purely for the purpose of drawing the pleadings and testifying at this trial?

A. No, sir; the purpose of my examination was to determine her present conditions and report those to her attorney.

Q. That's right, but not for the purpose of advising her of any course of treatment?

A. That's right.

Q. Now, Doctor, one thing I don't understand is relative to Plaintiff's Exhibit 4 and Plaintiff's Exhibit 3, down in the lumbosacral area, that little lump of calcification, that hematoma, I believe you called it, that disappeared in the five months between November, 1958, and April 7, '59, and from that you were able to conclude that since it had gone away in those five months, that it must have originated about five months before?

A. As near as I can say.

(Testimony of Dr. Howard M. Clemmons.)

Q. Would you spell that out a little bit more? Why does that follow?

A. Whenever an injury takes place that causes hemorrhage and calcium does form, very often it will absorb.

Q. Well, you were reasoning, then, that this was formed at the time of injury?

A. The hematoma was, the calcium probably some time shortly thereafter.

Q. In other words, you weren't reasoning that since that [127] much of it disappeared in five months that it was of such size originally that it must have originated in July of 1958? In other words, you couldn't do that? A. Oh, no.

Q. Because you didn't know the size of it originally? A. That's right.

Q. Now, it would necessarily follow, wouldn't it, Doctor, from the fact you had never seen or treated Miss Murphy prior to November, 1958, that you had no first hand knowledge of her condition at any time prior to that time?

A. Only by the history she gave me.

Q. And did you base your opinion in part upon the history she gave you?

A. Doctors always do.

Q. And this testimony would be based in part upon the history she gave you?

A. My conclusions were drawn from physical findings and X-rays.

Q. Well, then, her statements to you or her ex-

(Testimony of Dr. Howard M. Clemmons.)

planation to you would not be taken into consideration by you, is that right?

A. Well, they are always taken into consideration when a doctor examines a patient, but the explanations I gave here today are not related to history.

Q. Now, if you did not know of her condition prior to [128] November, 1958, naturally you wouldn't have known whether these conditions antedated or existed before June 24, 1958, would you?

A. That is correct.

Q. So your opinions would necessarily be based, as they obviously were, upon the hypothetical statement of the facts by Mr. Erickson?

A. That's right.

Q. Assuming that an operation is performed upon this lady, would she then be able to return to her normal occupation?

A. I couldn't answer that because one cannot guarantee the successful or unsuccessful outcome of this type of surgery.

Q. But in your particular field, aren't you expert in the area of rehabilitation?

A. Well, I have been interested in it, yes.

Q. And isn't it also true that a fusion of the bones renders them capable of performing the function for which they had been designed?

A. That's one of the chief reasons for doing a bone graft on the lower spine, to stabilize it so people can return to work.

Q. So that if, for example, you or some other

(Testimony of Dr. Howard M. Clemmons.)

capable physician performed the operation, would it be reasonable to expect she would be able to return to her usual occupation?

A. We would do the surgery with that in [129] mind.

Q. That would be the purpose of it?

A. That's right.

Q. And you have been talking in the terms of possibilities, would it not be true that it would be more probable than not that there would be success in that field?

A. I haven't added Miss Murphy to my statistics, so I can't answer that.

Q. Pardon me?

A. I say I haven't added Miss Murphy to my statistics. Whereas, between 80 and 90 per cent of these operations are successful, if hers were unsuccessful, that would be 100 per cent to her.

Q. Sure, it is nice to have a crystal ball at any time, but in other words, the statistics are 80 to 90 per cent success in this particular operation?

A. In general that is true, yes.

The Court: Doctor, is the arthritis, arthritic condition of age general throughout the body, or is that likewise localized?

A. It is more generalized.

The Court: And if you expect to find—if you do find what you believe to be an arthritic condition due to age at one place, you would expect to find that same condition, or nearly the same, throughout the body in the joints?

(Testimony of Dr. Howard M. Clemmons.)

A. Not necessarily throughout the body, but throughout that [130] particular area of the body. In other words——

The Court: Then, would you distinguish between the various areas of the spine, or would the spine be an area?

A. Well, the cervical spine, the neck——

The Court: Would be one area?

A. Yes; the dorsal spine another, the lumbar, and so on.

The Court: So you might very well find age arthritis in the dorsal spine, and not find it in the cervical?

A. That's true; yes, sir.

Q. (By Mr. Poore): Well, what, if any, significance does the fragment in the cervical spine have in this particular case, Doctor? I believe you referred in your report to a fragment in the area of the cervical spine. What would you say the medical signification of that would be?

A. That was in the lumbosacral.

Q. Well, let's put it this way: Calling your attention to the cervical spine, and the area you refer to as a fracture or breaking, what significance is that?

A. Well, the mechanism of the fracture in the cervical spine, that is, the way they happen is usually forward flexed.

Q. Is there any indication of nerve injury here to the spinal column? A. No.

Q. So that's what I am directing my question

(Testimony of Dr. Howard M. Clemmons.)

at. There is all kinds of fractures. I believe I heard you testify that [131] fragments of bones can be knocked off, for example, of the kneecap, and not affect the utility or what that portion of the body was designed to do, not affect its effectiveness. Now, what is the story on this fragment?

A. Well, it is not a separate fragment. I believe that there is irregularity on the under surface of the 5th cervical vertebra that matches the irregularity on the top of the 6th, both of which are abnormal in shape, and in my opinion are due to a forward flexed position of the head. Now, that's not the whole story. In addition to that, the intervertebral disc has been injured.

Q. Yes, but now we were talking a few minutes ago about the so-called broken neck. What were you referring to there?

A. That fracture; the compression.

Q. What fracture? Was there an actual fracture?

A. Well, fractures of vertebrae are compression type, whereas fractures of the long bones usually result in pieces becoming displaced.

Q. Now, don't fractures ordinarily heal?

A. Well, that's healed.

Q. So it's a healed fracture?

A. With the irregularity resulting and remaining.

Mr. Poore: No further questions. [132]

(Testimony of Dr. Howard M. Clemmons.)

Redirect Examination

By Mr. Erickson:

Q. With relation to the last question asked by counsel, I think you testified on direct examination that the healed fracture results in roughness, plus decrease in the intervertebral space, and you said, I believe, that that would cause discomfort and pain to Miss Murphy, is that correct?

A. That's correct; by limiting the motion of the neck, and with that abnormal condition of the structures there, muscle spasm.

Q. Now, Miss Murphy on the stand this morning, you may have observed her, put her hands around the back of her neck and raised her head up several times. She indicated she did that to get relief from discomfort in the neck. Could that be of significance as to whether or not this particular fracture condition might have caused her this discomfort?

A. Very frequently the patient will continue to complain of pain and will get relief by bending the neck backwards.

Q. The question was asked you, Doctor, about the history that was given, and you said since you had not examined Miss Murphy prior to November, 1958, you could not say positively whether that condition existed before June 24, 1958, or not. Now, Doctor, assuming, in response to that question, the hypothetical question we have given you before,

(Testimony of Dr. Howard M. Clemmons.)

and assume further that Miss Murphy had no pain in the cervical spine, no [133] discomfort in the cervical spine, and no pain or discomfort in the lumbosacral area, and had worked as a waitress carrying heavy dishes, and that on the day of the assumed fall, she immediately felt severe pain in her neck and in the cervical spine, and that by the next day severe pain took place or occurred in the lower spine, could you say, give an opinion, Doctor, as to whether or not this assumed fall could have caused the abnormality as of the time of the fall?

A. Yes, sir.

Q. And what is your opinion?

A. The opinion is that it could have produced the pains we have talked about here.

Q. You spoke of the possibility of surgery on the lower lumbar spine and a fusion. Would such surgery be practical or possible in the cervical spine, the neck?

A. Well, I recently did such a case.

Q. And was it successful, Doctor?

A. So far.

Q. Now, eliminating the lumbosacral area where a fusion is a possible method effecting some sort of repair, and eliminating that, have you an opinion as to whether or not the disability in the cervical area is sufficient so that it would disable Miss Murphy from carrying heavy trays, heavy dishes, heavy burdens, in her former occupation of waiting on table? [134]

A. The changes by X-ray in the neck are worse

(Testimony of Dr. Howard M. Clemmons.)

than they are in the low back, and I think that either one would be capable of limiting her activity, but if she had no trouble with the low back, I would say that, in my opinion, the trouble she has with the neck would be enough to eliminate her returning to the type of work she did prior to that.

Q. So that if surgery were performed for the purpose of putting her back on the job, it would be necessary to perform surgery both on the cervical and the lumbar, is that correct?

A. It may be necessary, but let me say in relation to doing a fusion on the cervical spine, it's extremely difficult to do that for this condition, and in my opinion would be rather radical. The reason I did it on the patient I spoke of prior was because he had a dislocated neck. It is rather radical surgery. It does leave the patient with an entirely stiff neck. We put him in this position (indicating), and the only thing he can move is his eyeballs. He can't move his neck after that.

Mr. Erickson: Thank you, Doctor, that's all.

Mr. Poore: No further questions.

(Witness excused.)

DR. LEO FRED ROTAR

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows: [135]

Direct Examination

By Mr. Erickson:

Q. Will you please state your name, Doctor?

A. Leo Fred Rotar.

Q. And your profession?

A. Physician and surgeon.

Q. And what university or medical school did you attend? A. St. Louis University.

Q. And you are now practicing in Butte?

A. Yes.

Q. And your offices are in the St. James Hospital Building? A. That is right.

Q. And how long have you been in practice, Doctor?

Mr. Poore: We would be happy to admit the doctor's qualifications.

Mr. Erickson: Thank you.

Q. I will just ask the question as to how long have you been in practice here, Doctor?

A. 16 years.

Q. And you are originally a Butte boy, are you not, Dr. Rotar? A. Yes.

Q. What is the type and nature of your practice?

A. Well, it is general practice, but we tend more toward traumatic work. [136]

Q. You are associated with Dr. Shields and

(Testimony of Dr. Leo Fred Rotar.)

others, are you not? A. Yes.

Q. At St. James Hospital? A. Yes.

Q. Here in Butte? A. Yes.

Q. And you were—you had your office in St. James Hospital on June 24, 1958, did you not?

A. Yes.

Q. Do you recall Mildred Murphy, the plaintiff in this action, came to see you on that date?

A. Yes.

Q. Will you tell the Court and jury what her condition was when you first saw her?

A. Well, when she came into the hospital for treatment that day, she had to be kind of more or less escorted in, somebody had a hold of her elbows on each side, she walked in on her own power, but she was definitely stunned; she had sustained quite a severe blow; and at that time my impression was that she got most of the blow on the posterior part of the head, the occipital area.

Q. Did she at that time give you a statement as to the history of her condition?

A. The history of her condition? [137]

Q. Yes; that is how she happened to have the blow?

A. Well, she slipped on the floor in the Safeway Store.

Q. And did you get that information from her?

A. Yes; I had that information.

Q. You got that from her?

A. From her.

Q. There was another person with her who has

(Testimony of Dr. Leo Fred Rotar.)

been identified here as Rose Ledingham. Did she give you any information as to the case?

A. I wouldn't recall that offhand.

Q. Will you tell us further about Miss Murphy's condition?

A. Well, the part of the body that received the most of the blow was the back of the head, and the way she explained her fall, the entire back was hit on the floor; so she had a contusion of the entire spine, the posterior part of the head and neck. That would be included in the spine.

Q. Now, can you describe to the jury this bump that you observed on the back of her head, as to whether it was large or not?

A. Oh, I would say it was approximately about —it wasn't raised too high, I mean as far as thickness was concerned, but it involved an area, oh, about four, four and a half inches in diameter.

Q. Now, you say that your practice has been very largely with trauma there, is that [138] correct? A. Yes.

Q. And it is a fact, is it not, Doctor, that people injured in the mines or industrial work, and all the hazards of manual occupations, you see trauma people like that, do you not? A. Quite a few.

Q. And could you say, give an opinion, Doctor, based on your experience and your training and your observation of Miss Murphy, the amount of the blow that would be required to cause the swelling that you saw?

(Testimony of Dr. Leo Fred Rotar.)

A. Oh, yes; definitely, there was no doubt about the amount of the swelling as related to the blow.

Q. Would you assume from the swelling that the blow was severe or not?

A. Severe; a severe contusion.

Q. What was her condition insofar as her other conduct? I have in mind, particularly, Doctor, whether or not she was in anything that would be designated by a doctor as a state of shock?

A. Well, she was stunned, you could say, mild shock. The blow was hard enough on the head to say that she had a mild concussion.

Q. And what, if anything, did you do, then, in the way of examination and treatment?

A. Well, X-rays were taken right immediately of the skull [139] and the entire spine.

Q. And the X-ray, as I understand, of the skull, showed no fracture of the skull?

A. No fracture at that time.

Q. Now, what did you do so far as Miss Murphy was concerned so far as treatment was concerned?

A. She was put on narcotics for pain and other medications for relaxing muscles.

Q. And that was done at her first visit?

A. First visit.

Q. Now, what did you tell her to do herself?

A. To be quiet, apply heat to any of the muscles that were sprained in the back. Her chief complaint was in the cervical area and upper back and posterior chest. That is where she took most of the blow, but I always advise patients to put heat on

(Testimony of Dr. Leo Fred Rotar.)

them, and probably tomorrow or the next day, or usually the next day, there are usually more aches and pains show up where they don't even think they got hurt.

Q. And was that the experience of Miss Murphy?

A. Yes; she had a lot more pain the following day.

Q. Now, Miss Murphy testified she was at your office, this was on a Tuesday, and she was there then again, I believe, on a Friday, do you recall that visit?

A. Well, no; I mean I can't pinpoint any individual visit, it is kind of hard to do when you have such a turnover of [140] patients.

Mr. Erickson: May I explain to the Court and to Dr. Rotar and counsel that I was not aware that the records of St. James were kept in a different spot than the doctor's office, and when I called today about them, it was explained to me that it would be difficult to get them, but I believe that Dr. Rotar has a sufficient personal recollection of this case so it is not necessary to have the records.

Q. Can you say how often you treated Miss Murphy?

A. Well, let's see, I would say it would average one to three times a week over an extended period of time, and then after she started feeling better, I saw her maybe every third or fourth week, but she was in at least once a month.

Q. And that has continued down to date?

(Testimony of Dr. Leo Fred Rotar.)

A. To date, yes.

Q. Now, what has the course of treatment consisted of that you have given Miss Murphy?

A. Actually, it is primarily rest and medication for pain and heat.

Q. And has Miss Murphy been a good patient insofar as co-operating with you is concerned?

A. Yes, sir; she has done everything she has been advised to do.

Q. Miss Murphy testified on the stand this morning that at one time, Doctor, you suggested that she try some exercises [141] which she was unable to do, do you recall that, an exercise in which she stood against the wall and pushed herself away, but she advised you the pain was too great?

A. Oh, that flicks a little memory, that is true. I never have patients exercise as long as there is any muscular spasm or pain, because you just cause more pain and spasm. I think I was trying to have her raise her arms above her head because of stiffness of her shoulders. She was not able to do it at that time, but I told her, oh, after two or three or four weeks passed by that she could continue the exercise.

Q. Doctor, have you noted, or will you tell the jury and Court what, if any, progress Miss Murphy has made since June 24, 1958, when you first saw her, up to the time of your last examination?

A. Well, as far as progress is concerned, I mean, she sustained a severe injury on—was it the 26th?

Q. The 24th.

(Testimony of Dr. Leo Fred Rotar.)

A. The 24th of June, and she had a pretty severe time for the first two weeks, then she gradually started improving, she started moving a little more, but her headaches have been more or less persistent through the whole course of therapy, and even vomiting and nausea, the first three or four days, if I remember correctly, and the headaches have become less severe, but she still states at times they recur, and——

Q. And what about the neck and the pain in the back insofar [142] as her subjective symptoms are concerned?

A. Well, now, she has some loss of motion laterally, lateral flexion on each side, and rotation, like this (indicating), but I have no basis to go on, she had that from the start, but right now, I mean she does not have normal rotation or normal lateral flexion. I have no norm.

Q. What about the lower back? Does she complain more or less of pain in the lower back?

A. When I saw Miss Murphy, the majority of her complaints were her neck and headaches. The complaints of the back, she did mention them, but not as persistently as she did the pain in the neck and the headaches.

Q. Doctor, has she given any indication of unusual nervousness?

A. Yes; there has been some accentuation of her nervousness following the accident, and for some time following I would say she was quite nervous for about three or four months after the accident,

(Testimony of Dr. Leo Fred Rotar.)

and I think when the pain started to subside, her nervousness subsided more or less.

Q. Now, you had not examined Miss Murphy prior to June 24, 1958, is that correct?

A. Well, I had taken care of her, but not for any neck ailment or back ailment.

Q. Now, did she complain to you about headaches prior to June 24, 1958? [143]

A. No.

Q. Did she complain about pain in the cervical spine? A. No.

Q. Did she complain to you about nervousness prior to that date?

A. No; not that I recall.

Q. Did she make any complaints about her spine generally?

A. No; no complaints of the area involved.

Q. Do you happen to recall when you last saw Miss Murphy before June 24, 1958?

A. Gee, I wouldn't know.

Q. But you had been her doctor?

A. I think I have seen her on two or three occasions for minor ailments or injuries before this accident.

Q. Now, you have seen, Doctor—pardon me, I have a question before that. I believe, Doctor, you told me that Miss Murphy had a certain amount of muscular spasm or spasm or rigidity of some kind, is that correct? A. That's right.

Q. Where was that?

A. It was mainly the cervical area and the pos-

(Testimony of Dr. Leo Fred Rotar.)

terior dorsal area, involving both shoulders, posterior chest, cervical muscles.

Q. And what does that mean, rigidity?

A. Well, you get a muscle that's sprained, swollen, spastic, [144] it is spastic because it is tender.

Q. And during the time you have treated her up to date, has Miss Murphy said anything to you about sleeping?

A. She has had trouble, persistent trouble sleeping.

Q. And have you prescribed anything for her?

A. She has been taking some type of sleeping pills almost continually, she did for some months after the accident. I don't believe she is on them now.

Q. Miss Murphy was unable to recall on the stand how many times she had prescriptions filled or what the prescriptions were, except that one cost $2.50 and another cost $2.50 and another one cost $1.50, and I know you won't be able to give us that testimony, but it is true, is it not, that she has been having some sort of medication by prescription from you right from the start?

A. She has been on some tranquilizers as well as sleeping pills.

Q. And what is the purpose of giving her those?

A. For the nerves, and so she will be able to sleep.

Q. Doctor, have you seen any of the X-rays that are exhibits here, 1, 2, 3, 4, 5——

(Testimony of Dr. Leo Fred Rotar.)

A. No; I have never seen those pictures before except from a distance.

Q. And you haven't had a chance to observe them? A. No. [145]

Q. Doctor, based on your examinations of Miss Murphy and your treatment of her and her condition as it now is, have you an opinion as to whether or not Miss Murphy is able to work at the occupation of a waitress in which she would be required to hold heavy trays containing dishes in one hand and up at shoulder level?

A. I don't think she would be able to do it. She couldn't pursue that occupation.

Q. Doctor, you saw Mildred, of course, on June 24, 1958, when she gave you the history of the fall, but apart from that, do you have an opinion on this hypothetical question: Assuming that Mildred Murphy had worked as a waitress for some 30 years prior to June 24, 1958, and that she had had no particular trouble with her cervical spine or with her lumbar spine or with her head, and that she walked into the Safeway Store on Granite Street and fell in such a manner that her feet shot out from in under her and she landed flat on her back and hit her head, and that immediately thereafter the situation that you observed arose, the lump on the head, the pain and discomfort that has continued, have you an opinion as to whether the fall that we have assumed could have caused the difficulties for which you have been treating Miss Murphy? A. Yes.

(Testimony of Dr. Leo Fred Rotar.)

Q. And what is that opinion?

A. That it could have caused them. [146]

Mr. Erickson: That is all.

Cross-Examination

By Mr. Poore:

Q. Now, Doctor, I believe you said you took X-ray pictures of the entire spine in your treatment of Miss Murphy? A. Yes.

Q. And that they were negative?

A. They were negative as far as fracture was concerned, there was no bony pathology.

Q. So that from your examination of those X-rays, for the entire length of the spine, you were able to find no fractures? A. No.

Q. Now, Doctor, would you say that Miss Murphy's difficulties lay in muscle injuries?

A. Well, partially, yes.

Q. Well, what was your opinion as to what she was suffering from, or what had happened to her?

A. Well, it was a contusion of the head and back resulting in a spraining, probably of most of the muscles of the spine, followed by muscle spasm, muscle sprain, and probably some hemorrhage.

Q. Right. In other words, am I correct in this, Doctor, that it was a type of muscle injury that you would characterize as muscle sprain that caused difficulty, is that correct? [147]

A. Yes; at the onset muscular spasm was the cause of most of her difficulty, for the first two or three weeks.

(Testimony of Dr. Leo Fred Rotar.)

Q. And thereafter that gradually subsided, did it not? A. Yes; it subsided after——

Q. Then, am I correct in this, Doctor, that the X-rays you have taken, but which haven't been produced here in evidence, would show no fractures of the spine?

A. They revealed no fractures at the time.

The Court: Do they reveal any other abnormalities aside from fracture?

A. There were some arthritic changes.

The Court: And when were those taken?

A. Right the day of the injury.

The Court: Would X-rays that show arthritic changes taken at that date indicate that the arthritic changes resulted from trauma, or at least from that trauma, or from some other age or trauma?

A. Those changes were already present before the particular accident.

Q. (By Mr. Poore): Doctor, Miss Murphy has been under your exclusive medical care since the date of the injury? A. Yes.

Q. You have referred her to nobody?

A. Dr. Plett saw her for an ear ailment.

Q. But other than that you have been her attending and [148] treating physician?

A. Yes.

Q. Responsible for her recovery and care?

A. Yes.

Mr. Poore: We have no further questions.

(Testimony of Dr. Leo Fred Rotar.)

Redirect Examination

By Mr. Erickson:

Q. Dr. Rotar, Dr. Clemmons testified that in cases of injuries to the spine where there is a decrease in the lumbosacral joint following trauma, that except in the case of a rupture of the disc, X-rays taken immediately thereafter within a short time would not necessarily show the injury to the intervertebral disc, is that correct?

A. That's true.

Q. And your X-rays were taken, as I recall, all of them prior to September, 1958, is that your recollection of it? A. That is true.

Q. And if Dr. Clemmons took X-rays in November of 1958 and again in April of 1959, and they show a reduction in intervertebral spaces between vertebrae, would you assume that that would be perfectly normal, that is, that X-rays taken early would not show it, and X-rays taken later might show it, even though the injury occurred before you took the first X-rays, is that correct? [149]

A. You would have to assume that it was associated with the injury.

Mr. Erickson: That is all.

(Testimony of Dr. Leo Fred Rotar.)

Recross-Examination

By Mr. Poore:

Q. Let me ask one more question. Doctor, in the course of your treatment, have you seen any cause or necessity to take any more X-rays than were taken by you during the course of your treatment?

A. Well, I didn't order any more X-rays; the patient was progressing satisfactory. She had pain, and the headache was persisting, and she had still some loss of motion of the neck, and I took as many pictures as I thought were necessary.

Q. In other words, the particular treatment you were prescribing, the results were coming as you hoped for as as you believe was proper?

A. That's right.

Mr. Poore: No further questions.

Mr. Erickson: May I ask one further question?

The Court: That's the old system. Lawyers ask one more question and we'll be here until midnight.

Mr. Erickson: Your Honor, this matter of our——

The Court: Go ahead.

Mr. Erickson: There is one question I should have asked [150] other than that.

Redirect Examination

By Mr. Erickson:

Q. Dr. Clemmons talked about the headaches that now exist as characterized as a post concussion syndrome. Would that be a proper way of designating the existing headaches? A. Yes.

(Testimony of Dr. Leo Fred Rotar.)

Q. It means, in other words, they are a hang-over from the blow to the head?

A. From the original injury.

Mr. Erickson: That is all.

The Court: May the doctor be permanently excused?

Mr. Erickson: Yes.

The Court: Thank you, Doctor; that is all.

(Witness excused.)

The Court (Jury admonished): You are excused until Friday morning at 10:00 o'clock. Be back at that time. Court will stand in recess until that time.

(Whereupon, a recess was taken until Friday morning, April 17, 1959, at 10:00 o'clock a.m., at which time the following proceedings were had:)

The Court: Very well, call the next witness.

MARGARET ROSA

called as a witness on behalf of the plaintiff, being first duly sworn, [151] testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you please state your name?

A. Margaret Rosa.

Q. And will you speak up, Mrs. Rosa, so that everyone can hear you. And where do you live?

(Testimony of Margaret Rosa.)

A. At 209 West Boardman.

Q. And that is in the City of Butte?

A. Yes.

Q. And you are married, Mrs. Rosa?

A. Yes.

Q. How long have you lived at your present address? A. About 15 years.

Q. And how long have you lived in Butte?

A. All my life.

Q. And are you a sister of Mildred Murphy?

A. Yes; I am.

Q. And how far away from Mildred's house do you live? A. Oh, about three houses.

Q. And she lives on Montana Street, and you live on Boardman which intersects with Montana, is that correct? A. Yes.

Q. Now, over the years, have you seen a great deal of your sister, Mildred? [152]

A. I see her every day.

Q. Is there a considerable amount of visiting back and forth between you and Mildred?

A. Yes; there is.

Q. Does that also apply to the children?

A. Yes.

Q. How many children do you have?

A. I have five children.

Q. And the oldest? A. The oldest is 29.

Q. The youngest? A. 16.

Q. Now, calling your attention to the date June 24, 1958, do you recall having seen Mildred on that date?

(Testimony of Margaret Rosa.)

A. Yes; I was down home when my brother brought her in.

Q. Your brother is Frank? A. Yes.

Q. Mildred has testified that he is since deceased. A. Yes; he is.

Q. Now, will you tell the Court and jury where you saw Mildred, and describe her condition on that date?

A. Well, I was there when she came in. She came in screaming, complaining about her head, so I got her to bed right away, and then my brother went down and got the prescription that the doctor gave her, and I gave her the medicine as soon [153] as I could.

Q. Will you tell us about what time of day that was?

A. Well, it was around noon some time. I don't know just exactly what time.

Q. When you say your sister was screaming, would you say whether or not she seemed to be hysterical or dazed?

A. Yes; I think she was hysterical.

Q. Now, you put her to bed, is that right?

A. Yes; I did.

Q. Did you examine your sister at all at that time?

A. No; I got her to bed, that's all, tried to quiet her down and gave her her medicine, and she had the bump, this large bump right on the back of her head which worried me very much.

Q. You could see that? A. Oh, yes.

(Testimony of Margaret Rosa.)

Q. And when did you first notice that?

A. When she came home.

Q. Did she walk in unassisted?

A. Yes; she did. Oh, my brother was right close to her.

Q. But she was able to walk in? A. Yes.

Q. Will you describe the bump as to size and location?

A. It was quite large. It was about the size of your hand when you put your hand over it. It was quite large. [154]

Q. When you put your hand over it, would you say it filled your hand? A. Yes.

Q. Did you notice whether that bump changed any in say the first day, whether it got larger or smaller?

A. Well, I wouldn't say it got any larger, I couldn't say that, but it was there for about a week or more.

Q. How long did you remain at Mildred's house that first day?

A. I stayed all day and all night.

Q. And did you sleep in the same bed with her that night? A. Yes; I did.

Q. Now, will you tell the Court and jury just what Mildred's condition was during the day of the 24th of June, 1958?

A. Well, she was quite sick all that day. She was up and down. She couldn't stay in bed, and she couldn't stay up, she was terribly nervous.

Q. And she testified that she was nauseated and

(Testimony of Margaret Rosa.)

vomiting, did you observe that? A. Yes.

Q. Was that several times?

A. Oh, yes; she was that way for four or five days, I will say, all of that.

Q. Now, when she was up and down, what do you mean by up, what did she do when she got up? [155]

A. Well, she wasn't comfortable in bed, and she wasn't comfortable staying up.

Q. Now, the hysteria she had to begin with, did that pass away?

A. No; all that day she was like that. She would sleep a little while and then she would wake up crying and hollering about her head.

Q. What about that first night, could you tell us how much sleep she got?

A. She got very little.

Q. Did you, yourself, give her the prescription?

A. I followed the doctor's orders.

Q. Did you give her anything in addition to the prescription he had given her?

A. No; not the first few days.

Q. Now, what area was she complaining about most of the first day?

A. Her head; her head seemed to bother her and all in through her neck and shoulders.

Q. Now, was there any change on the second day?

A. Well, the second day she was pretty stiff. She said she ached all over.

(Testimony of Margaret Rosa.)

Q. Did she give evidence of that by the way she walked and that?

A. Yes; she did. It was hard for her to get out of bed. [156]

Q. And what about the second day; was that a day of up and down again? A. Yes.

Q. And what about the second night; were you there that night?

A. I stayed with her for two weeks. Those two first weeks were rough on her.

Q. Now, what about sleeping during the first two weeks?

A. She didn't sleep very good.

Q. And you were occupying the same bed with her; is that correct?

A. Yes, and I didn't get much rest either.

Q. Now, at the end of the first two weeks you quit staying there; why was that?

A. Well, I had to go home, and then my brother kind of took over.

Q. That's your brother, Frank?

A. Yes, and then my neighbor right next door, she took over.

Q. Is that Helen Kane? A. Yes.

Q. Had Mildred's condition improved substantially in the first two weeks?

A. Not too much, no.

Q. And during that two weeks, all of that two weeks, would you say her sleep was very much intermittent? [157] A. Yes.

Q. What about food, what food did she have in

(Testimony of Margaret Rosa.)

the first two weeks? A. Mostly liquids.

Q. Was she able to retain those?

A. At times.

Q. What about the vomiting and nausea, when did that end?

A. After the first week, that wasn't too bad.

Q. Did you accompany your sister, Mildred, to Dr. Rotar's office? A. Yes, I did.

Q. When was that?

A. On the following Friday, and from there on I went on all the trips with her.

Q. You went on all the trips to the doctor's office with her? A. Yes.

Q. Now, on the first trip you went to Dr. Rotar, do you recall whether or not X-rays were taken?

A. Yes, they took X-rays that day.

Q. And you were with Mildred in the doctor's office? A. Yes.

Q. How frequently did you go down to Dr. Rotar's office?

A. Well, I think she went down about once a week for awhile there. [158]

Q. Did you go with her every time?

A. Yes, I did.

Q. And how long did that period continue when you went once a week?

A. I think for over a month or more, I wouldn't say exactly because I'm not sure.

Q. Do you know that she has continued to go to Dr. Rotar since the time of the injury?

(Testimony of Margaret Rosa.)

A. Yes, she did up until a few weeks or a month ago.

Q. Do you know whether or not she is still under treatment by Dr. Rotar? A. She is.

Q. Now, after the first two weeks, will you tell the Court and jury what progress was made by Mildred insofar as recovery is concerned.

A. Well, Mildred had no ambition, she just lost all ambition. She wasn't able to do anything, and she complained about her back and her head continually.

Q. What about her nerves?

A. She was very, very nervous, and has been ever since, and she never was nervous before that.

Q. I will ask you about that in a moment, Mrs. Rosa. What about her housework, who did that?

A. She hasn't been doing it. I have been doing it and Mrs Kane. [159]

Q. And the housework consists of the preparation of meals for herself and now one brother, is that correct?

A. Yes. She does some of that, but no heavy housework.

Q. And what do you characterize as heavy housework?

A. Oh, washing windows, walls, scrubbing.

Q. And did she do that before June 24, 1958?

A. Yes, she did.

Q. Now, referring to the time before June 24, 1958, how long had Mildred lived at her present home? A. All her life.

(Testimony of Margaret Rosa.)

Q. That was the family home?

A. The family home.

Q. Now, before June 24, 1958, who did the housework? A. Mildred.

Q. And did that include this heavy work that you talk about? A. Yes, it did.

Q. Mildred is also interested in gardening, is that correct? A. Yes.

Q. And did she do that around the place before June 24, 1958? A. Yes.

Q. Now, did she do that in addition to her regular work as a waitress? A. Yes.

Q. And did you have to help her with those jobs? [160]

A. Well, when she was working I never helped her. She did all her own work.

Q. It wasn't until after June 24, 1958, that you started to help out on the work, is that right?

A. That's right.

Q. And Mildred has testified that your mother lived with her some years after your father died, is that correct? A. Yes.

Q. And in the last months of your mother's life, can you say whether or not Mildred did the housework at that time?

A. Mildred did the housework and worked besides and got very little rest.

Q. Now, what about Mildred's physical condition as you observed it before June 24, 1958, can you tell us generally what her physical condition appeared to be?

(Testimony of Margaret Rosa.)

A. Well, Mildred always had good health.

Q. Had you ever heard her complain about her neck or her back before that? A. No.

Q. Now, Mildred testified she had an operation in 1954. Was that connected in anyway with either her back or her neck? A. No.

Q. What can you say as to Mildred's working prior to June 24, 1958, can you say whether she worked regularly or not?

A. She always worked regularly all the time. She worked [161] steady.

Q. Now, you have mentioned Mildred's nervousness, and you said she was not nervous before June 24, 1958. Will you tell us a little more about that?

A. Well, Mildred was very calm, she wasn't a nervous person, but since this accident she is terribly nervous.

Q. What about her general attitude, can you say whether or not she was a cheerful person or not?

A. She was, very cheerful.

Q. And did your children visit with Mildred prior to June 24th?

A. They were with her all the time.

Q. And how did they get along?

A. Fine.

Q. I believe you told me that sometimes you wondered whether the children would rather be at your place or her place before the accident, is that correct?

A. I think they would rather be with her.

(Testimony of Margaret Rosa.)

Q. Now, what is the situation as to Mildred's nerves now?

A. Well, she is a little hard to get along with now, very cranky, very irritable.

Q. And does she give other indications of being nervous? A. Yes, she is terribly nervous.

Q. Can you see it?

A. Yes. She is just a different person [162] altogether.

Q. Before the accident, can you say whether or not Mildred was a person that liked to be on the go and visit and that sort of thing?

A. Yes, she did, she was always on the go.

Q. What about since the accident?

A. She doesn't do anything, you can't get her out of the house.

Q. And you would say she is no longer carefree as she was before? A. No, she is not.

Mr. Erickson: That is all. Wait a minute, Mrs. Rosa.

Cross-Examination

By Mr. Poore:

Q. You and Miss Murphy, as I understand, are sisters? A. Yes, sir.

Q. And you have lived there 15 years within three doors of your sister, as I understand it?

A. Yes, I have.

Q. And prior to that where did you live, Mrs. Rosa?

A. Well, I lived down home for awhile, and I lived a few years in Missoula.

(Testimony of Margaret Rosa.)

Q. Other than the few years in Missoula, you have lived with or near Miss Murphy all of her life? A. Yes, I have. [163]

Q. A close family relationship? A. Yes.

Mr. Poore: No further questions.

(Witness excused.)

HELEN KANE

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is Helen Kane?

A. Helen Kane.

Q. And where do you live?

A. 623 North Montana Street.

Q. And where is that with relation to the residence of Mildred Murphy?

A. We live right next door to one another. We share the one yard in back. Real close.

Q. How long have you known Mildred?

A. All my life, 42 years to be exact.

The Court: That's a new twist, isn't it.

Mr. Poore: Move it be stricken as not responsive.

Mr. Erickson: May I observe it's usually the ones that don't look it that will admit they are 42.

The Court: Very well done, Judge. [164]

Q. You are married? A. Yes, I am.

Q. You have children?

(Testimony of Helen Kane.)

A. I have a little girl three.

Q. Now, you have known Mildred Murphy, you say, all your life? A. All my life.

Q. And you are close friends?

A. Yes, very close.

Q. Now, calling your attention to the date of June 24, 1958, a date which the testimony shows Mildred Murphy suffered a fall at Safeway Stores, did you see Mildred on that date?

A. No, I didn't, but the next morning Frank came to our house and told my mother and I that Mildred was very sick and if I would go in, so I did immediately, and Mildred was in bed at the time, and as I went in she was nauseated, and I started to talk to her and she started to cry, and then she asked Margaret and I if we could help her to the bathroom which, with much difficulty, we did get her out of bed and into the bathroom, and she was terribly sick to her stomach. Then she came out in the kitchen and tried to sit down and she couldn't, so we took her back into bed again, and she laid across the foot of the bed. She didn't even get into bed, she wasn't able to.

Q. Why wasn't she able to?

A. She was in pain. [165]

Q. Could you see that she was in pain?

A. Yes, she was, she was in terrible pain, and she said that she was stiffening up, and she couldn't bend very well because she kind of fell sort of sideways, you know, half on and half off the bed,

(Testimony of Helen Kane.)

and Margaret and I helped her into bed then, and then——

Q. Not too fast.

A. I am sorry. And then I helped her—you know, I hadn't heard anything about it, so then they explained to me what had happened and——

Q. Don't give the conversation.

A. All right, and she complained about the pain in her head, and I separated her hair and looked at the bump and felt it and it was about that big (indicating) and it had a raise on it, and I really did look at that, and I stayed with her for about an hour and then I went back home, and then I went in again around three o'clock, and I stayed there about another hour, and then that evening I went in again and stayed with Margaret for about an hour, and then I had to go back home, and I saw her for four or five days afterwards steadily.

Q. Now, on that first day you heard Mrs. Rosa testify that Mildred seemed to be hysterical. Did you observe anything like that?

A. That day I went in she was crying, the first day I saw [166] her, she was crying then.

Q. And what about the succeeding days?

A. Well, I didn't see her then after that evening until the next day about, oh, about 11 o'clock in the morning, and she wasn't crying then, she had fallen asleep, and Margaret said she hadn't slept much during the night, but she had dozed off, so I didn't, you know, go in and disturb her.

Q. When did you next see her?

(Testimony of Helen Kane.)

A. Then I saw her that same day again in the afternoon.

Q. What was she doing then?

A. She was sitting in the kitchen and she was sitting sort of on the edge of the chair looking very uncomfortable, and then while I was there, she returned to bed because she started to get sick to her stomach again.

Q. And how frequently did you see Mildred then for the first few weeks?

A. Every day after that first day that I saw her, I saw her every day.

Q. And what did her condition seem to be during that first two weeks?

A. She complained of a throbbing pain in her head, and she was awfully stiff, she couldn't move around very well, and she had a pain right here (indicating) in her back.

Q. You are indicating the lower portion of the back now?

A. Yes, and also her shoulders, you know, right through this [167] area (indicating), she complained of a pain here, but of a throbbing pain in the back of her head.

Q. Now, after the first few weeks, how frequently did you see Mildred?

A. I see her every day.

Q. You go in and out of her house freely?

A. Oh, yes.

Q. Now, the testimony of Mrs. Rosa that you heard was that Mildred was not able to do her

(Testimony of Helen Kane.)

housework, and that between Margaret Rosa and you, you did a lot of the housework for her and have been doing it since her injury, is that correct?

A. Well, the first two weeks I didn't, but then Margaret went home, and since that time I have done all of Mildred's washing and ironing, and I did the inside of her windows for her, and I changed the linen on the bed for her, and at Christmas time, you know, I moved furniture and vacuumed and did all the heavy work.

Q. And why did you do it?

A. Well, she couldn't do it, she was unable to.

Q. And why do you say she was unable to?

A. Well, her back aches, she can't do much lifting, she is afraid to, she is afraid to do any lifting at all, and she was told to rest and take it easy.

Q. Now, what, if anything, have you observed about Mildred's sleeping habits since her [168] injury?

A. Well, she has told me time and time again that she had a restless night, that her head was aching, and I often said, "Well, why don't you try reading," and she said she tried it, but she couldn't because of this headache. She said if she reads just a few minutes, she gets so terribly dizzy that she would have to put the book down, and she tells me about getting up during the night, and in fact, our houses are so close, and her bedroom light does show a reflection in our room, and I see her light on three or four times if I happen to be awake, too.

(Testimony of Helen Kane.)

Q. Will you speak just a little louder?

A. I say our houses are so close that her bedroom light shows a reflection into my bedroom, and I have often seen her light on if I am up with the baby or with my mother.

Q. So that you were able to observe, in addition to what she has told you——

A. Yes, I see that light on.

Q. And has that continued right down to date?

A. Right as of now, it has.

Q. Now, what, if any, change did you notice in Mildred's nervousness or lack of nervousness, describe that?

A. Well, yes, we used to play Canasta together, you know, the families, and she no longer is interested in playing Canasta, and also we used to exchange magazines. She gives me the magazines, but she don't take any off of me, she isn't [169] interested in her hobby of reading any more, and she rarely goes to town. She used to love to go shopping and go visting. She rarely does that, and she used to take my little girl to town with her and care for her, in fact, she used to be my main baby sitter. She no longer does that. She is sort of melancholy.

Q. Would you say there is a marked change in her personality?

A. Oh, yes, she is worried because she is not working and there is no income in the family at all, and she is worried about that.

(Testimony of Helen Kane.)

Q. Now, you, since you are a neighbor, knew that Mildred worked steady before her——

A. She went to work right out of high school, I remember.

Q. What is that?

A. She went to work at Gamers right after she got out of high school.

Q. You know of your own knowledge that she worked there a good many years?

A. Yes, I used to make a lot of calls in there for my treats at Gamers when I was little. I remember she worked there for years.

Q. Now, in view of your close friendship with Mildred over the years, can you say whether or not prior to this accident she gave any sign of having discomfort in her lower back or her neck? [170]

A. No, she worked always and did her housework at home and cared for her mother, and she often helped me care for my mother when my mother was sick. We were always good neighbors.

Q. And she no longer does any of those things you detailed?

A. No, she doesn't. All she does is just her dishes and tidy up her table.

Q. From observing Mildred as you have, or Miss Murphy as you have, particularly in the last few months, does she give any outward sign of any discomfort?

A. Oh, yes, she is always doing this (indicating) to her neck, and I have asked her why and she said she felt like there was a weight on it.

(Testimony of Helen Kane.)

Mr. Poore: Just a minute, to which we object as a self-serving hearsay declaration.

The Court: Sustained.

Q. Tell us just what movements she makes?

A. Oh, well, she has a tendency to be always rubbing the back of her neck, and I have asked her why, and she——

Q. Now, don't tell what she said. Will you show the jury just exactly what movements you observed?

A. Well, she does this (demonstrating) all the time.

Q. And you are now indicating with your both hands that she puts them back of the lower part of her neck, and then arches her neck back, is that correct? [171]

A. Yes, she does, she pulls.

Q. When you say she pulls, what do you mean?

A. She stretches her neck, you know, like that (demonstrating).

Q. Does she give any other outward sign of any discomfort any other place than the neck?

A. Well, I have gone in there in the day time, you know, like I have, and I have seen her sitting with the heating pad on her back.

Q. Where abouts?

A. On the lower part of her back, sitting on the davenport.

Q. Have you noticed whether or not Mildred in sitting any place changes her position frequently or infrequently? A. Yes, she squirms a lot.

Q. Did she do that before this injury?

(Testimony of Helen Kane.)

A. No, she used to sit and play Canasta by the hour, and she never used to be uncomfortable.

Q. You couldn't see that she was uncomfortable at that time? A. Oh, no.

Q. Now, Mrs. Rosa has testified that Mildred was of a calm personality prior to the accident. Have you observed that?

A. Oh, yes, she liked people. She worked among people all her life, she liked them and she was very at ease.

Q. What about now?

A. No, she has just withdrawn to herself. She doesn't care [172] to be around people very much. She is just sort of quiet and likes to be left alone.

Q. Have you noticed whether or not that situation seemed to arise shortly after the accident?

A. Well, I noticed it two weeks after, you know. First she was so sick that naturally I wouldn't expect her to want to be around anyone, but after that she seemed to want to be left to herself.

Mr. Erickson: That's all.

Cross-Examination

By Mr. Poore:

Q. Mrs. Rosa—Mrs. Kane, have you heard any of the testimony previously to this in the case?

A. I have been here every day, yes, sir.

Q. You have been here in court throughout the trial? A. Yes, sir.

Q. Have you come to and from the trial with Mildred or Miss Murphy? A. Yes.

Mr. Poore: No further questions.

Mr. Erickson: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Erickson: I should now like to call Mr. Frazer as an [173] adverse witness.

WALTER C. FRAZER

called as an adverse witness by the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. You are Walter C. Frazer, Manager of the Safeway Store on Granite Street?

A. Yes, sir.

Q. And did you hold that position on June 24, 1958? A. Yes, sir, I did.

Q. How long have you been manager, Mr. Frazer? A. About 17 years.

Q. Are you acquainted with Mildred Murphy?

A. I know Miss Murphy from coming in the store, yes.

Q. And can you say whether or not she was a regular customer of Safeway's prior to June 24, 1958?

A. Oh, she was in the store, well, quite often.

Q. Now, you were served with interrogatories by the plaintiff, were you not, with questions concerning this case? A. Oh, yes.

Q. And the answers to those interrogatories, the

(Testimony of Walter C. Frazer.)

answers to those questions, were your answers, were they not? A. That's right. [174]

Q. And in your answers to the interrogatories, you gave the names and addresses of people who were employees of the Safeway Store on Granite Street on June 24, 1958, is that correct?

A. Yes, sir.

Q. In your answer to Interrogatory No. 3, you were asked in that interrogatory, "Did any of the employees of the defendant observe the plaintiff Mildred Murphy fall in the described store on June 24, 1958," and your answer to that was, "No employee saw the plaintiff fall," is that correct?

Mr. Poore: To which we object as a leading and suggestive question.

Mr. Erickson: I have him on cross-examination, your Honor.

The Court: Well, yes.

Mr. Poore: Improper use of interrogatories.

The Court: Well, yes, I don't think you have to base it upon the interrogatories, just ask him, and——

Mr. Erickson: It seemed to me that was the easiest way to ask the questions.

The Court: It might be, but I think that possibly you should just proceed to examine the witness. The testimony is what he says here on the stand.

Mr. Erickson: Very well, but I assume I may ask leading questions as on cross-examination.

The Court: Yes, yes, and you may use the

(Testimony of Walter C. Frazer.)

answers to the [175] interrogatories for whatever other purposes they may serve in the course of your examination.

Mr. Erickson: The only purpose in asking leading questions would be to speed it up.

The Court: Sure.

Q. Is it true that those who assisted Miss Murphy after the fall were Walter C. Frazer, Thomas R. Hart, Fred A. Stromseth, Albert Squires and Rose Ledingham? A. That's right.

Q. And were there any others assisted her besides those? A. Not to my knowledge.

Q. Who took Miss Murphy to the hospital, if you know? A. Rose Ledingham.

Q. And she was then an employee of Safeway?

A. That's right.

Q. Do I understand that she is no longer employed at your store? A. She isn't.

Q. What is the floor covering on the Safeway Store on Granite Street? State particularly as of June 24, 1958. A. A type of asphalt tile.

Q. Is that the covering that is still on the floor?

A. The same, yes, sir.

Q. What is the practice of your store as far as cleaning the floor is concerned? [176]

A. Well, it is scrubbed by water and soap and then waxed.

Q. And how frequently is that done?

A. That is done twice a week, Monday and Thursday nights.

Q. Now, was the floor scrubbed with soap and

(Testimony of Walter C. Frazer.)

water and waxed on the night of Monday, June 23, 1958? A. Yes, it was.

Q. And who did that? A. Leo Rodoni.

Q. Have you yourself observed Mr. Rodoni when he does this work? A. I have.

Q. Will you tell the Court and the jury what the scrubbing with soap and water consisted of?

A. Well, it is just a damp mop and it is thoroughly dried and then he applies the wax.

Q. When he scrubs it, what does he scrub it with? A. A cotton mop, a hand mop.

Q. He doesn't use a brush? A. No.

Q. Or a power brush?

A. No, it's a mop, a regular cloth mop.

Q. What kind of soap does he use, do you know?

A. It's a Waxcraft all purpose soap.

Q. Is that a product sold by Safeway Stores?

A. We don't sell it, no, it is used by Safeway, by the chain. [177]

Q. But it is not one of the products you have for sale? A. It's not for sale, no.

Q. Now, what kind of wax is used?

A. A Waxcraft wax.

Q. And is that product sold by Safeway?

A. That isn't sold by Safeway.

Q. Is this a paste or a liquid wax?

A. It is a liquid wax.

Q. Now, you have for sale in your store waxes, do you not? A. Yes, we have.

Q. Would you recognize this can marked Plain-

(Testimony of Walter C. Frazer.)

tiff's Exhibit 7 for identification, and bearing a price of 69 cents on the top of it, and the name on it is Aero Wax, as one of the products sold in your store here, Safeway? A. Yes.

Q. And would you be able to identify it as having been actually purchased at your store by the sign on it?

A. Well, no, I couldn't because all five stores use the same type stamp.

Q. If I were to say to you that I purchased that this morning at your store, would you think that could be possible?

A. It would be possible.

Mr. Erickson: We offer Plaintiff's Exhibit No. 7.

Mr. Poore: It is objected to as incompetent, irrelevant and immaterial to any issue in this case. [178]

Mr. Erickson: I will connect it up a little further, your Honor.

The Court: Very well.

Q. You do not sell Waxcraft in your store, is that correct, the wax that's used?

A. Not the wax that we use on the floor, no.

Q. Is there some reason why that's not sold at the store? A. I really don't know

Q. Do you have any idea why you use a product not sold at the store instead of a product you sell at the store?

A. Well, it has been tested by the chain, and as I understand, is used by 90 per cent of the stores

(Testimony of Walter C. Frazer.)

in the chain, and it has proved itself to be the wax that they wanted.

Q. Now, this Aero Wax is advertised as one that saves rewaxing, indicatingt that it lasts a long time. Can you say whether or not, of your own knowledge, Waxcraft is used because it lasts even longer than Aero Wax?

A. No, I wouldn't say that. With the traffic in the store the wax doesn't last long anyway, probably a day or two.

Q. Can you say from your own experience whether or not liquid wax self-polishing lasts longer than the paste waxes? A. I couldn't say.

Q. Are you familiar with your wax products?

A. Slightly.

Q. As a matter of fact, as manager over there for many years, [179] you know your own products pretty well, don't you?

A. Well, we have changed brands off and on.

Q. In addition to Aero Wax you sell Johnson's, do you not? A. Johnson's, yes, sir.

Q. And something called Stride?

A. Stride, a Johnson product.

Q. That's a liquid wax? A. It is.

Q. And is Simonize liquid?

A. There is a Simonize wax, and I believe it is a liquid, yes, it is.

Q. And you would assume that none of the products which you sell in the store because Glasscraft—what is the name of it? A. Waxcraft.

Q. Because Waxcraft is a longer lasting wax,

(Testimony of Walter C. Frazer.)

is that correct? A. I wouldn't say that.

Q. You don't know? A. No. I don't.

Mr. Erickson: We offer Exhibit 7 again.

Mr. Poore: We renew our objection to the offer as incompetent, irrelevant and immaterial to any issue in the case.

Mr. Erickson: We believe it is, your Honor, because there is an issue in this case, or will be, whether wax builds [180] up.

The Court: Yes. I'll overrule the objection and admit the exhibit.

(Plaintiff's Exhibit 7 received in evidence.)

Mr. Poore: What is the number on that, Leif?

Mr. Erickson: 7.

Q. I will show you another can, it has written on it "Clean Floor," marked for identification as Plaintiff's Exhibit 8, and I'll ask you if that's a product that's sold at your Safeway Store? A. Yes.

Q. Now, so the record will be clear, if I were to tell you I purchased this at the Safeway Store at Helena rather than here, and with the mark on it, you would assume that it was sold by Safeway?

A. I assume that, yes.

Q. Now, this product, the advertising on it says that it is a wax remover and cleaner, and you would be familiar with it as such a product?

A. I wouldn't know what it could do, I mean I have never seen it used.

Q. The store sells it, though?

A. We sell it, yes, sir.

(Testimony of Walter C. Frazer.)

Q. Do you sell any other wax remover?

A. I believe that is the only one we have. [181]

Q. Now, was that product used, or has it been used, in cleaning your floor at Safeway?

A. No; it hasn't.

Mr. Erickson: We offer Plaintiff's Exhibit No. 8.

Mr. Poore: Again we object as incompetent, irrelevant and immaterial to any issue in this case; it doesn't prove or tend to prove any issues of the case.

The Court: Overruled; it is admitted.

(Plaintiff's Exhibit No. 8 received in evidence.)

Q. Now, prior to the night of June 23, 1958, can you tell me for how long the practice existed of waxing the floor at Safeway twice a week?

A. Oh, I would say 10 years, 12 years.

Q. And do you know of any time, and particularly limiting yourself to, say, the six months before June 23, 1958, when any product was used similar to Wax Off to remove all of the wax from the floor? A. No; I don't.

Q. Do you know of any scrubbing or——

A. Scraping.

Q. Scraping?

A. That is, in any built up area like against the display itself.

Q. So that on the edges of the walking surface in any aisle, there is a tendency for the wax to build up, is that correct? [182]

(Testimony of Walter C. Frazer.)

A. That's right.

Q. When was the wax that had been built up last scraped and removed prior to June 23, 1958, if you know?

A. Well, I would say approximately, well, it is only a guess, it would be around two months, that would be close.

Q. After the waxing is completed, is there any polishing of the wax surface?

A. There isn't any polishing, no.

Q. Is that because it is self-polishing wax that is used? A. That's right.

Q. Does the floor take on a sheen or a shine after the floor has been waxed?

A. It takes on a clean look, I would say.

Q. Does it reflect light?

A. Well, it shines slightly.

Q. Now, I have observed in going into your store, Mr. Frazer, that the tile is pretty much worn at the immediate entrance, and that there are places where the concrete shows through, but that when you get down into the aisles, the tile seems to be in much better shape, is that a correct statement of the condition there? A. I would say it was.

Q. And that would indicate to you that where the heavy traffic is is toward the front, there is greater wear there, is that true? [183]

A. That's right.

Q. And would you say from that that you would expect when you came into the store that after waxing probably those worn areas probably wouldn't

(Testimony of Walter C. Frazer.)

have the sheen or shine that the unworn areas have, would that be true?

A. Well, directly right by the door that would be true. The worn spot is right by the door.

Q. Well, I had noticed several of them this morning. You have seen this very crude drawing?

A. Yes.

Q. And assuming that that rail comes out to here (indicating)—I have got these things out of proportion, as you know—— A. Yes.

Q. Everyone coming into the store, to get any place in the store, when the check stands are occupied, must go down that route, is that correct?

A. The same route that you pointed out yesterday, you mean?

Q. Yes.

A. Or Thursday. No; most of them come around by the—towards the east, or the west part of the building to go through the produce itself.

Q. Well, yes, we are talking about the same thing. When you come into the store, you come in through the door which is to the east side?

A. That's right. [184]

Q. And the way to get into the store is to turn to your left and go west to the produce counters, is that right? A. That's right.

Q. And then turn and go through past this rail (indicating), and then go to any aisle you want to?

A. Yes.

Q. In fact, they could go around to the south of the produce counter, could they not, or is that right

(Testimony of Walter C. Frazer.)

up to the window? A. They go both ways.

Q. So that the greater wear on the floor would be in this area I have designated here with broken lines, is that correct? A. Probably, yes.

Q. And if I said that one worn spot is in the center of traffic about opposite the third check stand from the east wall, would you say that would be about where the concrete shows through?

A. Directly inside the door?

Q. Yes. A. That's right.

Q. It would be to the left of the door?

A. That's right.

Q. And if I said there were also some holes and patches next to the window up front, about the center of the window, do you recall that there are such holes or patches? [185]

A. There is one small one where the turnstile had been removed.

Q. That is what that is? A. Yes.

Q. Now, when you get around this corner and start this way (indicating), can you say whether or not the aisle, and particularly the aisle in front of the fruit and produce stand, whether the tile is in better shape there than it is in this main traffic-way? A. It is in a little better shape.

Q. Now, Miss Murphy was a little indefinite as to the exact location of the various counters, and probably because she was looking at my drawing. The produce counter is rather wide, isn't it?

A. Yes; it is.

Q. And the way it sits, if you were looking in

(Testimony of Walter C. Frazer.)

from the window, it would block the view of the second aisle from the west wall, would it not?

A. Yes, sir; about half way, I imagine.

Q. So if you wanted to go into this aisle which I show on the map, the only aisle I show, or really this is supposed to be the display case, you would come by this produce counter, and you would turn slightly to the left, would you not, to get into that aisle? A. Just slightly, yes. [186]

Q. And the distance from the rail back of which the carriages sit to the produce counter would be approximately what?

A. You mean the width of the aisle?

Q. Yes; in front of the produce counter.

A. Oh, I would say about three feet, three and a half feet.

Q. Now, the purpose of having the produce bin right there is to draw the attention of the customers to it, isn't that correct?

A. Well, that's part of the reason, yes, sir.

Q. And you make every effort as manager of the store to have attractive displays to catch the eye of the customers, isn't that true?

A. That's true.

Q. And you have specials advertised most every day, do you not? A. Every day.

Q. And you do that with the hopes that a customer comes in to buy a pound of coffee and comes out with $10 worth of groceries, isn't that right?

A. We hope.

Q. I would say at Safeway in Helena when I

(Testimony of Walter C. Frazer.)

do the shopping, which occasionally happens, they have great success. I have even come out with half a beef when I went in for a pound of coffee. And would you say that on June 24, 1958, the usual [187] condition existed, you would have had eye catching displays? A. I imagine so.

Q. Miss Murphy testified there was an attractive display of bananas on the produce counter, and she had intended, if she completed her mission, to buy some. Would that probably have been the case, that there would have been bananas on display there?

A. They would have been out, yes, sir.

Q. Now, the coffee counter, or the coffee display generally is on the west side of the display rack adjacent to the aisle which was partly blocked, so far as view is concerned, by the produce counter, is that correct? A. On the west, facing west?

Q. Yes. A. Yes.

Q. And was that the condition on June 24, 1958?

A. I believe it was.

Q. Now, you observed Miss Murphy after she had fallen, is that correct?

A. After. She was on her feet when I got up there.

Q. And where was she with relation to the produce counter when you saw her?

A. She was right, I would say, two feet north of the produce counter.

Q. So that she would be—— [188]

A. At the beginning of the aisle there.

Q. The beginning of the aisle that has the little

(Testimony of Walter C. Frazer.)

jog in it, is that correct? A. Yes.

Q. You arranged to have Miss Murphy taken to the St. James Hospital?

A. I asked Miss Murphy if she would like to go down to the hospital and be checked, and she said yes, so that's when I had Rose Ledingham take her down.

Q. Did you observe Miss Murphy's physical condition at that time?

A. Well, she was quite upset and she complained of her head.

Q. Did she show you the back of her head?

A. She had me feel the bump.

Q. And could you feel it? A. I could.

Q. Did you have any conversation with Miss Murphy within a month after this accident concerning a claim to be filled out by her?

A. I don't recall.

Q. Was there any conversation in which you indicated you would report the accident and prepare a claim for her?

A. No; I don't recall having said anything to Miss Murphy about it, but we do that right after an accident. [189]

Q. And did you do that in this case?

A. Yes, sir.

Q. Have you received reports of other persons falling in your store on Granite Street prior to June 24, 1958?

Mr. Poore: To which the defendant objects upon

(Testimony of Walter C. Frazer.)

the ground and for the reason there is no specification of time; it doesn't show whether it is remote or relevant.

Q. I will make the question within three years prior to June 24, 1959.

Mr. Poore: To which the defendant objects as being too remote as to time and improper.

Mr. Erickson: I do not propose, your Honor—I do not believe I have the right to go into detail as to who fell and what the reason was and——

The Court: No, but I think you would have to show that the conditions were approximately the same during that period that you are inquiring of.

Mr. Erickson: I have the question in mind for another reason, your Honor, and that's on a foundation for my proposed instruction on res ipsa loquitur, based on the assumption that ordinarily people would not fall.

The Court: Well, that's a different matter, but if you will ask some questions with reference to the conditions over the period of time that you are concerned about, I will admit it.

Q. Did you have any—strike that—— [190]

The Court: Were the floors and conditions that existed over that period the same as existed on the 24th of June?

Mr. Erickson: I thought I had largely established that.

Q. Were the conditions of the floor as of June 24, 1958, and particularly with relation to the area in front of the produce counter, approximately the

(Testimony of Walter C. Frazer.)

same on that date as they had been for the three preceding years?

A. I would say approximately, yes, sir.

Q. And what about the whole store? Would you say the floors were in about the same condition in 1958 as they had been for the preceding three years?

A. I would say yes.

Q. And was the practice as to cleaning and waxing the same for the three years that you have already indicated? A. Practically.

Q. Now, did you have reports of falls in the store by persons within the three-year period immediately prior to June 24, 1958?

Mr. Poore: To which the defendant objects upon the ground and for the reason there is no indication that the fall would be of a similar nature, whether it would be tripping over produce or the turned ankle type of fall, or stepping on lettuce leaves, or what type of fall it would be, and consequently it would be misleading to the jury, incompetent, irrelevant and immaterial. [191]

Mr. Erickson: It may be, your Honor, and as far as I am concerned, I don't care whether the testimony is that nobody fell or somebody fell, because my reason for asking the question is on the doctrine of res ipsa loquitur.

The Court: Well, ask the question with reference to just slipping on an open floor.

Q. Okay. Have you had reports of anyone slipping and falling on the floors, and I distinguish be-

(Testimony of Walter C. Frazer.)

tween someone tripping over grocery boxes or slipping on banana peels.

A. I believe there was one prior to that.

Q. Can you say whether or not that occurred on a day following a waxing the preceding night?

A. I couldn't say.

Q. Do you recall about the date of that?

A. I think it was about six months before.

Q. And do you know who the person was?

Mr. Poore: Again we object as incompetent, irrelevant and immaterial to any issue in this case.

The Court: Overruled.

A. I am not quite sure of the name. I believe it was Harrington.

Q. Would it be a Mrs. Helen M. Harrington, is that the person you think it might have been?

A. I am not certain I know the last name. I believe the last name was Harrington. [192]

Q. Now, since June 24, 1958, have you had any reports of a slip and fall not occasioned by tripping or stumbling in your store?

A. I believe that—I am not certain, but I think there was one fall of some kind afterwards.

Q. Would that have been a Mrs. Mary Antonovich? A. Yes; it would have been.

Q. Do you recall whether that was on a Tuesday or a Friday? A. That I don't recall.

Mr. Erickson: That's all.

(Testimony of Walter C. Frazer.)

Cross-Examination

By Mr. Poore:

Q. Mr. Frazer, in the three-year period to which you have been referring, how many persons, or how many sales have you had in your Safeway Store in three years before June 24, 1958?

A. Well, approximately 850,000.

Q. When you say a sale, what do you mean by a sale?

A. That's one transaction; one customer.

Q. Would that necessarily be one person?

A. Well, most of the time it would be.

Q. Could it involve two persons, for example, a husband and wife? A. It could be. [193]

Q. Or more persons? A. Or more, yes.

Q. So that in the three years prior to the happening of this accident there was, what did you say, 800,000 sales? A. Over 850,000.

Q. Now, since that time, since June 24th, up until the present time, do you know approximately how many sales you have had in that store?

A. I would say over 200,000.

Q. And would the same situation obtain in that, there again you are referring to individual transactions? A. That's right.

Q. Now, as to the two persons that were referred to there in direct examination, did either of those persons make any claim that their slipping and falling was Safeway's fault?

A. To my knowledge, no.

(Testimony of Walter C. Frazer.)

Q. Now, calling your attention to the aisleway there near where Miss Murphy was found lying down or had fallen, is the area in that portion of the store well traveled? A. Oh, it is.

Q. Are there also worn spots there on the asphalt tile? A. Yes; there would be.

Q. Is this exhibit, those exhibits, are those industrial wax, those exhibits that have been introduced, the one exhibit, the wax, is that industrial wax or home wax? [194] A. Home wax.

Q. The wax that was used in your place of business, what kind of wax was that?

A. I would say that was industrial wax.

Q. How many Safeway Stores is that used in?

A. I believe 90 per cent of the system uses it.

Q. How many stores in the system?

A. About 2,100.

Q. So approximately 90 per cent of 2,100 stores use the same system of washing and waxing that you use? A. Yes.

Mr. Poore: We have no further questions.

Redirect Examination

By Mr. Erickson:

Q. In distinguishing between an industrial wax and a home wax, would you think, Mr. Frazer, that an industrial wax would be heavier and would last longer than a home wax?

A. It is a heavy duty wax, that's all I know.

Q. Would you assume since you have distin-

(Testimony of Walter C. Frazer.)

guished, you said it was industrial as compared to a home wax—— A. It could be.

Q. An industrial wax would be one that would stay on the floor with heavier traffic than a home wax, is that correct?

A. I believe so, yes. [195]

Q. Is there any reason why you don't wax oftener than twice a week?

A. No; that seems to be sufficient. The floor holds up fairly well that way.

Q. So that the wax at least lasts for the three or four days, is that correct?

A. It holds fairly well, yes, sir.

Q. There was one question I omitted to ask you about the amount of wax used. What's the amount used on a waxing?

A. I would say about, oh, probably a little better than a quart.

Q. And does that come in a large five-gallon container or something like that?

A. Yes, sir; it does.

Q. Now, you, yourself, were not present when the floor was waxed on the night of Monday, June 23, 1958, were you?

A. I had to come back and leave the gentleman out of the store.

Q. He does that during the night?

A. Yes, sir.

Q. What time does he finish up?

A. Oh, approximately 8:30.

Q. But you would have no way of knowing of

(Testimony of Walter C. Frazer.)

your own knowledge whether he used a quart or more or less?

A. No; I just assume from ordering that that is what it would [196] amount to, a little better than a quart.

Q. He was doing the waxing and cleaning in accordance with your instructions, is that correct?

A. Well, the instructions that go along with the product.

Mr. Erickson: That is all.

Mr. Poore: No further questions.

(Witness excused.)

The Court (Jury admonished): Court will stand in recess until quarter after 11.

(Ten-minute recess.)

Mr. Erickson: I should like permission to recall Mildred Murphy for a few questions.

The Court: All right.

MILDRED MURPHY

the plaintiff, recalled as a witness on her own behalf, having previously been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Miss Murphy, you have already testified, and there are a couple questions that I overlooked asking you. You heard Dr. Rotar's testimony yesterday? A. Yes; I did.

(Testimony of Mildred Murphy.)

Q. And that of Dr. Clemmons?

A. Yes; I did. [197]

Q. Now, you saw Dr. Rotar for the first time on June 24, 1958, is that correct?

A. That day?

Q. Yes. A. Yes.

Q. Have you fallen since that time?

A. No; I haven't.

Q. Have you been involved in any accident since that time? A. No; I haven't.

Q. No automobile accident?

A. No; I haven't.

Q. Have you suffered any injuries since that date?

A. Besides the ones that I have, no.

Q. Do you have any income, Miss Murphy?

A. No; I always supported myself.

Q. Have you had any income since June 24, 1958? A. No.

Q. Do you have any stocks or bonds or anything? A. No; I haven't.

Q. So that you are solely dependent upon your earnings, or have been for your living?

A. Yes; I am.

Q. Now, you have testified that you have a brother living with you. Does he give you any money?

A. Well, he isn't working right now. [198]

Q. What is his occupation right now?

A. Laborer, and it is not very good in Butte right now, labor conditions, construction labor.

(Testimony of Mildred Murphy.)

Q. And what about his health, is he able to work steady when he does work?

A. Sometimes, but he isn't feeling any too good now.

Q. Now, Mr. Poore gave a list of restaurants that he asked you about whether or not they had closed. Are you familiar with those restaurants he named?

A. Just by name. I don't believe I was ever in any of them. Some of them I wouldn't go in. I know I wouldn't work in some of them.

Q. Are they smaller——

A. Smaller restaurants. I worked in the better, bigger houses.

Q. Can you say whether some of them are in neighborhoods where you would prefer not to work?

A. Yes, sir.

Q. They do employ some waitresses, don't they?

A. Oh, yes.

Q. So that their closing would mean that some waitresses would be out of work as a result?

A. Yes; there would be some out, yes.

Mr. Erickson: That is all.

Mr. Poore: No cross-examination.

(Witness excused.) [199]

Mr. Erickson: And with that, the plaintiff rests.

Mr. Poore: May it please the Court, we have a motion to address to the Court.

The Court: Very well. (Jury admonished.) You

are excused until 1:30, be back at 1:30. Kindly leave the Courtroom now.

(Jury leaves the Courtroom.)

Mr. Poore: May it please the Court, I would like to make an oral motion.

The Court: Yes.

Mr. Poore: Comes now the defendant, Safeway Stores, Incorporated, at the close of the plaintiff's evidence and after the plaintiff has rested her case in chief, and respectfully moves the Court to dismiss this action upon the following grounds and for the following reasons:

First, there is no evidence whatsoever that the defendant's store in question was negligently maintained or was in an unsafe or dangerous condition at the time of the accident in question, or that the defendant did not use ordinary care to keep its premises reasonably safe for its customers, including the plaintiff herein.

Two, that there is no evidence whatsoever that the defendant failed to use due care in the selection and application of the wax to the floor.

Three, that the doctrine of res ipsa loquitur is not applicable. [200]

Four, there has been no proof whatsoever as to any one or more acts of specific negligence upon which the plaintiff can predicate any inference favorable to her alleged cause of action. [201]

* * *

WALTER C. FRAZER

called as a witness on behalf of defendant, having previously been sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name again, please, to the Court and jury. A. Walter Frazer.

Q. For the purposes of the record, you are the same Mr. Frazer who has testified heretofore?

A. That's right.

Q. You just testified this morning?

A. Yes.

Q. Where do you live? [231]

A. 1134 West Park in Butte.

Q. How long have you been a resident of Butte?

A. Most of my life.

Q. Are you married? A. Yes; I am.

Q. Have a family? A. One daughter.

Q. How old is your daughter, Mr. Frazer?

A. 18.

Q. Pardon me? A. 18 years.

Q. Is she attending local schools?

A. She goes to Carroll College in Helena.

Q. How long did you state you had been with Safeway Stores? A. 25 years.

Q. In what capacities, Mr. Frazer?

A. Clerk and manager.

Q. How long have you been associated with the present store where you are manager?

A. Two years.

(Testimony of Walter C. Frazer.)

Q. And at any prior time had you worked in that store?

A. I worked there one year at the opening about 20 years ago.

Q. How long ago did it open?

A. I would say about 20 years.

Q. And what is your capacity down there at the store at the [232] present time?

A. Store manager.

Q. And as store manager, are you the top man down there, so to speak?

A. I imagine that would be it.

Q. Now, during this period of 20 years that you have referred to that the store has been located there, has it been open for business?

A. Pardon?

Q. Has it been open for business during that period of 20 years? A. Yes; it has.

Q. In constant use? A. Yes; it has.

Q. Has there been any substantial change in the layout of the floor and the floor covering in those 20 years?

A. The floor covering, I imagine, has stayed pretty much the same, although the store has been changed.

Q. What is the floor covering?

A. Asphalt tile.

Q. Do you know when that was laid, or approximately how old it is?

A. Well, unless it has been changed from time

(Testimony of Walter C. Frazer.)

to time in different spots, it has been laid, as I say, 20 years.

Q. Now, would you describe what that asphalt tile is? [233]

A. Well, it is an asphalt with a top coating of various colors.

Q. And what size squares or what size pieces is that laid in, approximately?

A. Oh, I would say 9 by 9.

Q. And is the entire floor so covered?

A. That's right; all the sales floor, that is.

Q. Would you describe that floor to the Court and to the jury, the entire floor area, as to whether it has any unlevel portions or what the fact is about it?

A. No; I would say it is fairly level.

Q. And how about being smooth or rough?

A. Well, there is some of it is a bit rough, but it's mostly smooth.

Q. The rough areas you refer to, are those the areas you testified to earlier today where you said they had been worn? A. That's right.

Q. Would you describe to the Court and jury what the lighting system is?

A. I believe the lighting is very good.

Q. Well, what kind of lighting does it have?

A. It is all ceiling tube lighting, and it lights the store, I think, very well. We also have lighting, excuse me, also lighting around the sides of the walls, too. [234]

Q. In your testimony this morning, you referred

(Testimony of Walter C. Frazer.)

to a system of maintenance of the floor. Now, were you then referring to this asphalt tile floor as to which you have just testified? A. Yes, sir.

Q. Now, what maintenance is that that's carried out there at the store, and referring more particularly to on or about June 24, 1958, what was the maintenance system?

A. Well, the scrubbing and waxing twice a week, Mondays and Thursdays.

Q. Would that be in the morning, afternoon or night, or what is the fact?

A. All done at night after closing hours.

Q. What are the regular store hours down there?

A. Store hours are from Monday through Thursday, from 9:00 to 6:00. We usually open at 8:00, and Friday and Saturday are 9:00 until 8:00.

Q. Who is in charge of the maintenance of the floors, or more accurately at that time who was in charge? A. Leo Rodoni.

Q. Is he still in charge?

A. He is still in charge.

Q. Now, I believe you said that the floors are washed and then they receive a treatment?

A. That's right.

Q. Now, what is the purpose of this system of floor maintenance? [235]

A. Well, in washing it—is that what you mean?

Q. Well, both operations, why do you do that?

A. Well, the scrubbing is to take the dirt off the floor, of course, and then the wax is applied, well for cleanliness, and it's really easy for us to

(Testimony of Walter C. Frazer.)

handle—well, dust is our big problem, and this here solves a lot of that. It is easier to maintain the floor when it is waxed.

Q. It keeps down the dust?

A. Yes; it does.

Q. Are goods for sale, various fruits and vegetables on the display counters?

A. That's right; they are all in the open and it is very essential that the floor should be clean.

Q. Now, directing your attention to the date of the accident, namely, June 24, 1958, what time were you opened on that morning, what time did people start arriving?

A. Well, I was there at 8:00, and we opened the doors. At that time we are serviced by our bread and milk and cookies, cakes, and so forth, between the hours of 8:00 and 9:00, so, therefore, the door is open and we do receive quite a few customers.

Mr. Poore: Would you have any objection to my withdrawing this witness?

Mr. Erickson: None at all. [236]

The Court: Do you think it is necessary to put the witness on? Have you had a look at the pictures, have you seen them?

Mr. Erickson: No.

The Court: Just submit them to counsel, and we may not have any problem.

Mr. Erickson: May I consult with my client?

Mr. Poore: Yes.

Mr. Erickson: May I ask this witness a question or two?

(Testimony of Walter C. Frazer.)

The Court: Yes.

Mr. Erickson: Have you seen these pictures, Mr. Frazer?

A. No; I haven't.

Mr. Erickson: May I ask if this is about the way it looked on June 24, 1958, that is, looking back toward the front of the store?

A. That is from here up to here (indicating).

Mr. Erickson: Yes.

A. That is approximately it.

Mr. Erickson: Look at the next one now.

A. The only thing here, there was a rounded end display which was removed since. Outside of that——

Mr. Erickson: I have no objection if you want to offer the pictures as they are.

The Court: Very well; have them marked.

Mr. Poore: Defendant offers in evidence Defendant's Exhibits 9 through 12, inclusive. [237]

Mr. Erickson: Have you offered those?

Mr. Poore: Yes.

Mr. Erickson: I have no objection, except I understand from the witness, Mr. Poore, that the corner on the produce counter—I don't think that it is significant—was rounded in 1958, and it is now square, and except for that I understand it is the same, and I have no objection.

The Court: Very well, they are admitted.

(Defendant's Exhibits 9 to 12, inclusive, admitted.)

(Testimony of Walter C. Frazer.)

Q. (By Mr. Poore): Mr. Frazer, calling your attention to Defendant's Exhibit No. 11, I will ask you if that exhibit shows the entrance to the store on Granite Street, or the edge of the entrance to the store on Granite Street?

A. It doesn't show the entrance or the front part.

Q. Does it show the area immediately adjacent to the entrance on Granite Street?

A. It shows the aisle after the turn, which is right here (indicating).

Q. I call your attention to the left edge of the picture, does that show the entrance, the store entrance on Granite Street?

A. No; the door is swung to the left.

Q. Would you mark with this grease pencil where the door is by indicating by an arrow?

(Witness does as requested.) [238]

Q. And how far to the left in the direction of that arrow would the door be, Mr. Frazer?

A. It would be directly off the side there.

Q. How far?

A. I would say about a foot.

Q. About a foot away from where the arrow is. Now, there has been some testimony in the case of the route of the patrons of the store from the entrance through the store to the area of the coffee counter, as it then existed. Does that picture show that route generally?

(Testimony of Walter C. Frazer.)

A. It shows a portion of it, down the aisle by the vegetable stand.

Q. Would the other portion also be along these windows along Granite Street?

A. That's right.

Q. Would you describe how a person coming into your store would have traversed the area of that picture, taking the route that Miss Murphy described that she took?

A. Well, they would come in the door facing north, walk in towards the north, walk west——

Q. Would you mind stepping down and explaining this to the jury so they can see what you are describing?

A. They would enter the door here (indicating)——

Q. And by "here," you are referring to the arrow you made on the exhibit? [239]

A. That's right, and follow west to the end of the check stands, then make a right turn and down the aisle here to approximately here (indicating).

Q. And by "here," is the other extreme of the picture opposite the arrow? A. Yes.

Mr. Erickson: May I ask a question on that picture?

Mr. Poore: Yes; you certainly may, Mr. Erickson.

Mr. Erickson: This that you see is the back of the check stand, is it not? The picture is taken looking toward the back of the stands?

A. Yes; these are the backs of the stands.

(Testimony of Walter C. Frazer.)

Q. (By Mr. Poore): Now, would you please take a look at Defendant's Exhibit 12, and state what that picture shows?

A. Well, that is the end, or part of the aisle that was just mentioned, plus the end of the produce display.

Q. Now, was that produce display rack in the same condition on June 24, 1958, as that picture display is now? A. No; it wasn't.

Q. Was the floor just the same?

A. It was the same measurement, I mean the end would come to the same spot, but there was a rounded end display which was removed, and the full display was pushed north three feet to pick up room in the front.

Q. Am I correct in this, then, Mr. Frazer, that it would [240] occupy the same place as this display counter, but had a rounded corner?

A. That was the only difference.

Q. Any difference in the floor as shown there and at the time of June 24, 1958?

A. I can't see that there is.

Q. Now, does this particular exhibit show the area of where Miss Murphy was found?

A. A part of it, right here (indicating).

Q. By "here," you put your finger——

A. Right at the entrance, I would say right here (indicating).

Q. Would you put a circled "1" there with the grease pencil?

(Testimony of Walter C. Frazer.)

Mr. Erickson: May I ask a question in connection with his answer?

Mr. Poore: Certainly.

Mr. Erickson: As I remember, Mr. Frazer said he didn't see Miss Murphy lying down, she was standing up?

A. That's right.

Mr. Erickson: Are you referring to the place where she was standing?

A. I am referring to the place where she was when I come up. I am referring to the place where she was brought to her feet.

Mr. Erickson: Thank you.

Q. (By Mr. Poore): I hand you the Defendant's Exhibit No. 9 [241] for identification—not for identification, but it has been admitted in evidence—and ask you if you know what that picture is?

A. That's the same end only facing more towards the coffee table, and it shows more of the full aisle itself. This end here (indicating) would be the end of the last picture, and this (indicating) would be the aisle from there on through.

Q. What appears to be the square corner of the display counter is the same display counter identified in the previous exhibit, is that correct?

A. That's right.

Q. Is that the same corner that was at that time rounded? A. It was rounded at the time.

Q. And would you indicate again with this grease pencil on this particular exhibit where it

(Testimony of Walter C. Frazer.)

was that you first saw Miss Murphy on the date of the accident?

(Witness does as requested.)

Q. And I place a "1" inside a circle that you have placed on Defendant's Exhibit No. 9. Now, I hand you Defendant's Exhibit No. 10, and ask you if that same display counter appears there as was in the previous exhibits?

A. This is the end we were just speaking of right here (indicating).

Q. That is the same display counter?

A. Yes. [242]

Q. Now, in what direction was the photographer facing with that shot?

A. He was taking it from north to south.

Q. Looking toward what direction?

A. Toward south.

Q. Toward the front of the store?

A. Yes.

Q. And there again would you indicate with the grease pencil approximately where it was that you saw Miss Murphy on that day in question?

(Witness does as requested.)

Q. And I put a "1" in the circle which you have already drawn on Defendant's Exhibit 10. You may step back on the stand, Mr. Frazer. I believe you were testifying as to the time that you opened on June 24, 1958.

A. Actually at 8:00 o'clock.

(Testimony of Walter C. Frazer.)

Q. And would you describe to the Court and jury what personnel and what activities generally were going on there that morning, say, from 8:00 until 10:00 or 10:30 in the morning?

A. Well, at first there would be all of the delivery people there, usually at 8:00 or shortly after, and they start coming in with their products such as bread and milk, cookies and cakes, and they stocked their own shelves.

Q. Now, what areas of the store would they be stocking?

A. Well, they would stock the bread table on the east wall [243] at the front of the store, and the cakes are the same, and milk and cream and so forth, dairy products, on the west side at the beginning of the store sales floor.

Q. Now, would these persons in stocking these various portions of the store be traversing the area which you circled with a "1" in these various exhibits?

A. They would have to come in that way with both bread and—mostly bread because they come down that same aisle to go to the east wall to stock the shelves. The others may either come down there or go further to the west and take that last aisle down to their places.

Q. Are those loads of bread of substantial size?

A. Yes; he has a truck which carries, I believe, 10 pallets of bread, I believe that's the word for it. Well, one driver may make five trips, where maybe another would only make one or two.

(Testimony of Walter C. Frazer.)

Q. And how many loaves of bread in a pallet, what you referred to as a pallet? A. Ten.

Q. Now, in addition to bread, what other supplies are brought in at that time of the morning?

A. Milk and cream and cakes.

Q. And do those persons cross the general area as you have indicated on the exhibits with a circled "1"?

A. Some do, most of them do, and some [244] don't.

Q. And what loads are they moving, describe that to the Court and jury, please?

Mr. Erickson: To which we are going to object on the grounds and for the reason that there is no attempt to hook this up with the specific date and the specific instance.

Mr. Poore: Excuse me.

Q. On that particular day in question, Mr. Frazer, what loads would these persons supplying your store be normally carrying or moving at that time of the morning?

A. Well, on that particular day, it would probably be—I would have to go down the line and almost take each one of them.

Q. Well, would you do that, please?

A. We have Eddy's Bakery; they may bring in three of these truck loads of these said pallets on that particular day; and the milk, Community Creamery may bring in a full six-wheel truck, which we have in the store. They use those to bring the

(Testimony of Walter C. Frazer.)

milk in, and some are brought in by just packing the merchandise in boxes and walking in.

Q. Are there any cake dealers on Tuesdays?

A. Pardon?

Q. Any cake deliveries?

A. On the cakes the same; he usually brings them in by just carrying them in a box.

Q. Besides milk and bread and cakes, are there any other [245] deliveries in the front door of the store at that time of the morning?

A. As a rule that would be the size of it.

Q. And would you estimate how many—withdraw that. Now, what is the duties, if any, of your sales force, of your personnel there at 8:00 o'clock or from 8:00 until 10:30 in the morning on that particular day?

A. Well, there would be one to two people, it varies, to set up the produce stand.

Q. Is that the particular stand you have described here? A. Yes, sir.

Q. And what do you mean by "set up the produce stand"?

A. Well, in other words, to fill it up and get it ready for the day's business.

Q. Describe the duties of any other employees from 8:00 until 10:30 in the morning in and around that area?

A. Well, there's myself, I have to take care of the checking in of the orders, unless I am occupied otherwise, then someone else takes care of that.

(Testimony of Walter C. Frazer.)

Then there are two meat men arrive at the same time, too.

Q. Pardon me?

A. There are two meat men that arrive at that time of the morning, too.

Q. Do they have loads?

A. No; they just walk through going to [246] work.

Q. To take orders, is that it?

A. To get back in the market.

Q. Now, is there any customers in the traffic at that time from 8:00 until 10:00 or 10:30 in the morning? A. We have quite a few.

Q. Approximately how many sales did you have on that particular day?

A. Up until, say, around 10:00?

Q. No; the total day.

A. Oh, the total day, I would say better than 550.

Q. Have you checked that?

A. Yes; it's over 550.

Q. Now, up until that particular time of day, could you estimate the number of persons, suppliers, employees and customers, that would have been in and around that area between 8:00 and 10:00 or 10:30 in the morning?

A. Between 8:00 and 10:00, I would say around 70, 75.

Q. Now, calling your attention particularly to that day again, was there any other incident of any

(Testimony of Walter C. Frazer.)

person having any difficulty slipping or complaining of any slippery substance on the floor?

A. Not to my knowledge.

Q. Now, Mr. Frazer, when was the first that you knew that Miss Murphy had fallen down?

A. I was called, I don't recall by whom, but I was called [247] by one of the clerks, one of the personnel to come up in front.

Q. Where were you at that time when you received the call?

A. I am not quite certain. I was down in one of the aisles towards the back.

Q. Approximately what is the interior size of that store, the floor space?

A. Well, the sales space, I would say would be about 50 feet wide against a hundred long.

Q. And that would be roughly 5,000 square feet?

A. That's right.

Q. Now, what proportion of that would you say is taken up by display counters?

A. Oh, probably a little better than half.

Q. Did you see Miss Murphy fall?

A. I didn't actually see Miss Murphy fall, no.

Q. And what did you say was the first you knew about it?

A. When I was called up to the front.

Q. And what did you do when you were called up, Mr. Frazer?

A. I went over and asked Miss Murphy how she was feeling and where she was hurt and she said that it was her head.

(Testimony of Walter C. Frazer.)

Q. Well, you say you went over, whereabouts in the store did you go to?

A. I went over to where Miss Murphy was standing.

Q. All right, now, where was that in relation to the display [248] counter that you described as then having a rounded edge and the coffee table?

A. Well, right off the end of it, as near as I can figure, where I put those circles.

Q. Does any one of these exhibits, Mr. Frazer, show where the coffee was at that time, the coffee display? A. Yes; right here (indicating).

Q. Is that still coffee?

A. That is still the same.

Q. It is still coffee. Would you mind putting a box around where the coffee was on that particular day, June 24, 1958?

A. You mean the regular coffee display here (indicating)?

Q. Yes.

(Witness does as requested.)

Q. You have drawn a half of a triangle, would it be all right if I complete this triangle and bring it down?

A. That's right; it's all the way through.

Q. On the Exhibit No. 9, there is now a rough rectangle indicating some coffeewares?

A. Yes.

Q. And on that same exhibit there is another circled "1" which, as I understand your testimony,

(Testimony of Walter C. Frazer.)

is where Miss Murphy was standing when you saw her? A. Yes.

Q. Now, when you first saw Miss Murphy, what position was she [249] in?

A. She was standing.

Q. Was she being supported by anyone, or what is the fact?

A. I believe she was somewhat by Rose Ledingham.

Q. Rose who? A. Ledingham.

Q. And I believe you stated you had some conversation with Miss Murphy. What did you say to her, and what did she say to you?

A. I just asked Miss Murphy how she felt and whether she was hurt, and when she answered that she had fallen and that her head was hurt, I asked her if she would like to go down to the hospital and have an examination, and she said she would. Then I sent her on down to the hospital with Rose Ledingham.

Q. Do you recall if there was any other person in or around Miss Murphy at that time other than Miss Ledingham?

A. Well, as I can recall, there was Rose, and at the time, I believe, Al Squires, I am not certain.

Q. Was there any other person besides Al Squires and Mrs. Ledingham that you recall?

A. There may have been.

Q. Approximately how long did you visit there with Miss Murphy prior to her leaving for the hospital?

(Testimony of Walter C. Frazer.)

A. Oh, just a matter of a very few [250] minutes.

Q. Did you examine the bump on her head?

A. I did.

Q. Would you describe to the Court and jury what your examination disclosed?

A. Oh, it was a good sized bump. I would say the area would be the size of an egg, and the height was about, oh, I don't know, about a quarter of an inch. It is pretty hard to say.

Q. What portion of her head was that on, Mr. Frazer?

A. As I recall, it was towards the back.

Q. While you were around there, and while those others, those other persons were around there, did you notice anybody slip or fall?

A. No; I never.

Q. Did you notice anything slippery in that area? A. No; I didn't.

Q. Did you slip yourself?

A. No; I didn't.

Q. Now, did you make any examination of the floor at that time? A. I did.

Q. And was that at the time Miss Murphy was there or after she had gone, or what is the fact?

A. At the same time.

Q. Will you describe to the Court and jury what your examination [251] disclosed, what it consisted of, how did you examine it?

A. I looked it over closely, and it was, as far as I know, clean. In my opinion, it was real clean.

(Testimony of Walter C. Frazer.)

Q. Did you see any skid marks on the floor?

A. I don't recall seeing any.

Q. Any heel marks? A. No.

Q. Did you see any liquid or foreign substance at all? A. Nothing.

Q. And I believe you described it and said it looked clean? A. That's right.

Q. How much of an area around there did you examine?

A. Well, the immediate area, that whole end and the front of the—the starting of the aisle.

Q. The area around the counter and where the coffee was? A. Where the coffee was.

Q. Now, at that time or thereafter, did you do anything to that area of the floor?

A. Nothing.

Q. And after Miss Murphy left for the hospital, did the business of the store go on as usual, or what is the fact? A. It went on as usual.

Q. Thereafter during that day, did anybody else to your knowledge experience any difficulties in that area—— A. Not to my knowledge. [252]

Q. ——by way of slipping or falling or complaining of a slippery condition? A. No, sir.

Q. After Miss Murphy left for the hospital, thereafter did you see her again prior to this time?

A. I could have; I don't recall.

Q. You didn't go down to the hospital yourself?

A. No; I didn't.

Q. Who was it again that you asked to take Miss Murphy to the hospital?

(Testimony of Walter C. Frazer.)

A. Rose Ledingham.

Q. And approximately how long was she gone, Mr. Frazer?

A. Oh, I would say approximately three-quarters of an hour or an hour.

Q. And thereafter did she return to the store?

A. That's right.

Q. And, as I understand it, then, you did not thereafter see Miss Murphy relative to this accident, you didn't go down to the hospital?

A. No; I didn't go down to the hospital at all.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Did you report this fall to any one? [253]

A. We have a report we have to make out and send to the office.

Q. You sent that to the Safeway office, is that right? A. The Safeway office, yes, sir.

Q. Did Miss Murphy seem dazed at all when you talked to her?

A. Yes; she seemed to be slightly dazed.

Q. Was she calm?

A. Well, she was, I would say, a little excited.

Q. Now, with reference to the pictures and the location of where you saw Miss Murphy, so far as you know, she had been standing for an appreciable time when you got there, or can you say?

A. I wouldn't say it had been very long at all.

(Testimony of Walter C. Frazer.)

Q. Do you think she was standing about at the spot where she had fallen?

A. That was my understanding.

Q. Did you hear her fall? A. No, sir.

Q. Now, the Exhibit No. 9 shows where she was standing past the produce counter and in the aisle in which the coffee was on display, is that correct?

A. Yes, sir; that's how I recall it; that's the spot I recall.

Q. You have indicated on the Exhibit No. 9 that she had gone past the produce counter and was at the head of the aisle in [254] which the coffee is contained, is that right? A. Correct.

Q. Was there a coffee display on the right-hand side as you go in, as well as the left, on that date, or do you remember?

A. On that date, this here coffee display (indicating) wasn't there. They are changed periodically.

Q. And you have designated on Exhibit 9 a stack of coffee marked "Edwards Coffee," and when the picture was taken, that was some sort of a special, would that be why it was there?

A. That's right; the daily special, yes.

Q. And as far as you can recall, on June 24, 1958, that would not have been there, is that correct? A. As I recall it.

Q. Now, your mark No. 1 on all of these indicates that Miss Murphy was standing, if these are 9-inch squares, 9, not to exceed 18 inches from the end of the produce display, is that correct?

(Testimony of Walter C. Frazer.)

A. Yes.

Q. And that would show on all of these because the squares, if it is a nine-inch square——

A. That is a guess on my part. I think it is pretty close.

Q. Now, there is a discrepancy, apparently, in the location, because in the Exhibit 12, you have that "1" placed 1, 2, 3, 4, 5, 6 squares away from the produce counter, while in the others you have it about two or three, is that just the way [255] it happened to look to you?

A. That is the way it looked when I put it down there.

Q. But would you be inclined to say that the others that show her closer, there are two of those, would more truly represent where she was?

A. I believe so.

Q. And by those two answers, you have indicated that on Exhibits 9 and 10, the "1" in the circle more truly represents where Miss Murphy was with relation to the counter, being these two, than in Exhibit 12, which shows her some distance further down the aisle than those two?

A. I would say that would be more so. That's where she was standing when I came up.

Q. Now, you are used to walking on the floors in the Safeway Store? A. Yes, sir.

Q. Because that's your job, isn't it?

A. Yes, sir; it is.

Q. Now, as to who actually came in on the morning of June 24, 1958, and the exact time they came

(Testimony of Walter C. Frazer.)

in, so far as these suppliers are concerned, can you say who actually came in that morning?

A. I couldn't really pinpoint it to any minute, but I can put it within a certain 15-minute radius.

Q. In the first place, do you know how many actually did come [256] in that morning?

A. I can tell you in one second.

Q. I mean, do you recall specifically that that morning you saw those specific people come in?

A. Well, it's every morning we receive these deliveries.

Q. It would be the same on that morning of June 24th as any other day? A. That's right.

Q. Now, you have indicated that those bringing cakes and bread would go down the aisle which shows up very clearly in your Exhibit 9, they would go by the coffee counter going by the bread display?

A. No; I said down the produce counter, down this small aisle here (indicating), and then they would turn here (indicating) and go to the right of the store.

Q. I see, so the way that the exhibit looks, which is Exhibit 9, you have indicated that the bread people do not come down past No. 1, but instead of that, they turn and go off to the right?

A. That's right.

Q. Now, this Exhibit No. 11 shows the carts. We don't have a picture from the front, but I think you have seen this rough drawing of mine here where it indicates that you would come in the en-

(Testimony of Walter C. Frazer.)

trance and go down around here (indicating), and then go past a railing, and the course of the bread and cake [257] people would be around this way (indicating), is that correct? A. Correct.

Q. And that's rather a wide aisle, is it not, between the produce and that fence?

A. What do you mean by wide aisle?

Q. Well, it would be wider than the regular aisles going down through the displays, would it not?

A. It probably wouldn't be quite as wide—you are asking about this spot right here (indicating), between the buggies and the display case?

Q. Yes.

A. It wouldn't be as wide as the full aisles in the store on the sales floor.

Q. Well, my recollection from observing the store this morning and prior to that is that this aisle (indicating) would probably be about eight feet wide between this rail and the display case, do you think that would be about right?

A. That seems like a lot.

Q. Well, what would you say it would be, six feet?

A. Probably six, but, like I was saying before, sometimes we put baskets up to the side here (indicating). Now, I think you asked me once before, and I think I said three and a half or four feet, whatever I said, but it was right in there, but that would be with a line of baskets. Now, sometimes we have them, sometimes we don't have them. I

(Testimony of Walter C. Frazer.)

don't [258] recall if they were there that morning or not.

Q. You have been referring to Exhibit 11, which is the exhibit showing the baskets lined up in the rear view looking towards the checking stands, is that correct? A. Yes.

Q. And the question that I asked you was about the width of the aisle immediately ahead of the produce stand, is that correct?

A. That's right.

Q. And you said that you wouldn't know how many baskets were in there?

A. Well, it all depends just what we have there at the time.

Q. Now, the distance between the rail—may I ask you one question on that? Miss Murphy has spoken of a turnstile, and an examination of the store shows there is no turnstile there now, but you have also testified there was a hole, I mean a spot on the floor—— A. A mark.

Q. ——where the turnstile had been. Was that turnstile there on June 24, 1958?

A. No; it wasn't a turnstile.

Q. It was sort of a gate proposition?

A. I am quite sure we had taken it out by then. Now, I wouldn't swear to that, but all we had on there that isn't there now is, oh, a half-moon effect that was part of a [259] turnstile. That had been left there so the buggies couldn't come on through.

Q. I see, and you are not sure whether that was there or not? A. I am not certain.

(Testimony of Walter C. Frazer.)

Q. The question that I have in mind is that now there is, going over to the check stand, and we have only the rear view of the check stands, there is on the front a rail that goes out some distance to the west, is there not, from the check stands?

A. That rail runs north and south, and it's the length of the check stands on the foremost west check stand. Is that the one you are thinking of?

Q. Well, my recollection is that the carts are lined up alongside of a rail going north and south, and that there is a short stub rail going east and west in front of that. A. No.

Q. Then I am mistaken on that?

A. You are, sir.

Q. So that the width of the aisle on that particular date depends entirely on how many carts?

A. If we had an extra line, or if we had them lengthwise in front of the other two lines.

Q. So that your estimate of the width of the aisle in front of the produce stand would have to be a guess because you don't [260] know how many baskets there were that morning?

A. That's right; it would be flexible.

Q. Now, if there were no baskets at all, what's the distance between the check stands and the——

A. You mean from the railing to the produce stand?

Q. Yes.

A. Oh, I would say between five and six feet.

Q. You don't think it is more than that?

(Testimony of Walter C. Frazer.)

A. I don't, but I am a poor judge of that kind of stuff.

Q. Well, one or the other of us is. I believe you have testified that the people bringing in milk would go to the extreme west wall, and go down that aisle, is that true? A. As a rule.

Q. And you say that after the fall, the floor in the area looked real clean?

A. It did to me, yes, sir.

Q. Unusually so?

A. No, sir; about the same as it usually is.

Q. You spoke of the floor being a bit rough. Did you have reference to the area that you have marked No. 1 on the exhibits, or were you speaking of other areas of the floor?

A. What was that?

Q. You said in your direct examination that the floor was a bit rough. Were you referring to the area where you saw Miss Murphy standing, or referring to the other areas? [261]

A. I was referring more to the area in the front.

Q. The main entrance? A. Yes, sir.

Q. I think you have testified on my earlier examination that there wasn't much wear on the tiles there at the end of the produce counter, not as much as there was in the main entrance, is that true?

A. I said there was less, I believe.

Q. So that the tiles there would be in a better condition? A. Yes.

Q. And is it true that where the tiles wear, the

(Testimony of Walter C. Frazer.)

dirt pits them somewhat, and they are a little gratier surface and a little rougher surface?

A. It can be that way after a certain amount of traffic has been over the floor.

Q. My observation of the floor was that in that main entrance and going past the check stands, the tiles seemed to be a little pulpier than they were in the other aisles. Would that be a fair description of it? A. Of the front end?

Q. Yes.

A. Well, it would be more of a rougher surface.

Mr. Erickson: That is all I have. [262]

Redirect Examination

By Mr. Poore:

Q. Mr. Frazer, have you paced off the distance from where the turnstile formerly was, if that's what the thing was called, to where Miss Murphy was standing, the approximate distance there?

A. I did from the door on through.

Q. And how far was that?

A. That was 15 steps.

Q. Now, what do you mean by a step?

A. A regular walking step.

Q. Would you illustrate to the jury what you are referring to by a step, just get down and show us 15 of those?

A. I just walked as I would normally (demonstrating).

Q. 15 of those? A. Yes.

Mr. Poore: We have no further redirect.

(Testimony of Walter C. Frazer.)

The Court: Sit down just a minute. I wish you would tell me and the jury about the conversation you had with Miss Murphy. Mr. Poore asked you to tell us about that conversation, and from the way you told it, I kind of have the impression that you were telling us your conclusion as to what the conversation was, you weren't using the words that you used, and the exact words that she used. What was the first words you said to her? Don't say, "I asked her how she was," [263] but what were the words, "How are you," is that what you said, or "What happened," or what are the words that you used?

A. Well, I probably said—I am not certain of what I did say your Honor, but to be close, I would say, "How are you, how are you feeling," and "were you hurt," and she in turn told me that "Yes, my head hurts quite a bit, and I have a bump," and she asked me to feel the bump on her head, which I did.

The Court: Did she say anything in that conversation—in that conversation you have just now recited, you have not said anything about a fall or a slip or anything of that kind. Did she say anything like that?

A. No, not that I recall.

The Court: As I recall when you first recounted the conversation, you used the words something about her falling. She didn't use the words, she didn't say that she fell?

A. Not that I can recall, your Honor.

(Testimony of Walter C. Frazer.)

The Court: She didn't say anything about how she got on the floor?

A. She was more or less talking about her condition.

The Court: She didn't say how she got the bump on her head?

A. No, not at the time, she didn't say it to me.

The Court: Very well.

Mr. Poore: No further redirect. [264]

Recross Examination

By Mr. Erickson:

Q. You assumed, or you knew as soon as you got there that she had fallen? A. Yes, sir.

Q. And you assumed the bump was the result of the fall? A. That's what I assumed.

Mr. Erickson: Nothing further.

Redirect Examination

By Mr. Poore:

Q. Mr. Frazer, when you were paged, so to speak, do you recall if you were told what had happened?

A. Well, whoever told me said that somebody had fallen up in front, and that's when I walked up to where Miss Murphy was.

Mr. Poore: No further questions.

(Witness excused.)

ALBERT SQUIRES

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. Mr. Squires, would you please state your name to the Court [265] and jury?

A. Albert Squires.

Q. Where do you live, Mr. Squires?

A. At 321½ North Alabama.

Q. And are you married? A. Yes, sir.

Q. Do you have a family? A. No, sir.

Q. What is your business or occupation?

A. I work for the Safeway Stores at the store on East Granite Street.

Q. How long have you been so employed, Mr. Squires? A. Since 1951.

Q. What is the nature of your work over there?

A. Well, right now, I am the Produce Department Manager, but at the time this accident must have happened, I wasn't, I was employed as the head clerk.

Q. I see. Now, as I understand it, your employment during the past five years has been in the East Granite Street store? A. Yes, sir.

Q. Now, do you recall an incident on or about June 24, 1958, involving Miss Murphy, the plaintiff here? A. Yes, sir.

Q. Do you recall seeing her on that day in the store? A. Yes, sir. [266]

Q. Did you see her fall? A. No, sir.

(Testimony of Albert Squires.)

Q. When was the first that you knew that she had fallen?

A. Well, I was in that aisle where I think she had fallen, but I wasn't sure because I heard this, well, kind of a strange noise, just a little different noise than you would normally hear, and I turned and looked up the aisle, and I immediately went towards her.

Q. Went where?

A. Went towards the spot where Miss Murphy was.

Q. When you first saw her, what was her position on the floor?

A. Well, I think when I got there, I think, if I remember right, she was partially to her feet, with the help of Mrs. Ledingham.

Q. Now, if we can orient where you were working at that time. Would you take a look at these pictures, Mr. Squires, and see if any of those show the general area where you were working when you heard this noise.

Mr. Erickson: To which the plaintiff is going to object because by reason of the marks which have been put on the exhibits by the prior witness, the pictures are in effect leading and suggestive of the answer.

The Court: Overruled. He doesn't know what the marks are as far as I know. [267]

Mr. Erickson: Well, he was present in the courtroom, your Honor.

The Court: Well, I know—were you present in

(Testimony of Albert Squires.)

the courtroom during all the time the last witness was testifying?

A. No, your Honor, I just came in.

The Court: Just came in before you went on the stand? The objection is overruled, go ahead.

Mr. Poore: To be sure we don't violate—is there any exclusionary rule here, your Honor?

The Court: No.

Mr. Poore: There are other persons back there.

The Court: No, no.

Q. My question was if there is any picture here that shows where you were at the time that you heard this unusual noise?

A. I was down this aisle here (indicating), but this picture doesn't go down far enough to show exactly where I was.

Q. All right. Now, you are referring to Exhibit No. 9, and to the aisle that's shown in that exhibit?

A. Yes.

Q. Is that the exhibit that has coffee in the aisle, in the display counter adjacent to the aisle, or at that time had coffee?

A. Well, no, it didn't have coffee right then. It was stocked with other items.

Q. Well, was there any coffee in the full length of the aisle [268] there? A. No, sir.

Q. You don't believe there was. Where was the coffee at that time?

A. It was right on the other side.

Q. By right on the other side, you mean on the other side of the same counter? A. Yes, sir.

(Testimony of Albert Squires.)

Q. What side of the counter is this, east or west?

A. This here is the east side.

Q. And would the coffee have been on the west side? A. Yes, sir.

Q. Now, does this Exhibit No. 9 show the beginning of the aisle where you were working?

A. Yes, sir.

Q. Now, approximately how long would you say that aisle was? A. The total length?

Q. Let's phrase it this way: Approximately how far down that aisle were you from where you first saw Miss Murphy?

A. I was about three-fourths of the length.

Q. And how far would that be in distance, Mr. Squires? A. Oh, gee——

Q. Could you pick out some object here in the courtroom that you think is about that [269] distance?

A. Oh, I would say it was as long as this courtroom.

Q. The full length of the courtroom?

A. Yes, sir.

Q. Now, was anyone working there with you at that time? A. Yes, sir.

Q. And who was that?

A. That was Tom Hart.

Q. Who was that, sir? A. Tom Hart.

Q. Tom Hart? A. Yes, sir.

Q. And after you heard this noise, what did you say you did?

A. I immediately went towards that noise at a

(Testimony of Albert Squires.)

hurried step, and as I remember it, she was partially to her feet with the help of Mrs. Ledingham, and I helped her up the rest of the way.

Q. And you say you helped her up yourself with the help of Mrs. Ledingham? A. Yes.

Q. Now, would you describe how you assisted her up, if you recall?

A. If I remember right, I think I took her by the arm and helped her to her feet.

Q. Do you recall where abouts on the floor of the Safeway Store Miss Murphy was when you first looked up and saw her? [270] Where was she in the store when you first saw her?

A. Right at the head of this aisle.

Q. The same aisle that you were working in?

A. Yes, sir.

Q. Is that the same aisle that runs into the produce counter?

A. Yes, sir, it just runs right up and runs to the end of the produce counter.

Q. Now, do any of those pictures there show the area where Miss Murphy was situated when you first saw her?

A. Well, I believe it was right about here (indicating).

Q. Now, you have put your finger on a spot, and would you mark that with a—with some designation that you want, an "X" or a "Y" or something?

(Witness does as requested.)

Q. Now, what portion of her body would you say

(Testimony of Albert Squires.)

was there, Mr. Squires? And you have made a—is that an "X" or a "Y"? A. That's an "X."

Q. Can you make the leg a little longer and draw a circle around that?

(Witness does as requested.)

The Court: In other words, Mr. Poore doesn't know how to read, is that the explanation of that?

Q. What portion of the plaintiff's body does that represent, or is it a general representation?

A. That represents her whole body to me. [271]

Q. About where she was situated on the floor?

A. She covered the whole area there.

Q. What direction were her feet pointed—how was she laid out or what is the fact, describe it to the Court and jury?

A. Well, it looked like to me her legs were going towards the north.

Q. That would be towards you?

A. Yes, sir.

Q. And then what direction would her head have been going? A. To the south.

Q. Out toward the Granite Street entrance?

A. Yes, sir.

Q. Now, when you first saw her, what was her position on the floor? There again, just describe in your own words what you recall?

A. It has been so long ago I can't remember very good except I think when I first saw her, I think she was at the beginning of getting up.

(Testimony of Albert Squires.)

Q. And it was then that you ran up this distance and assisted her to her feet?

A. Yes, sir.

Q. You and Mrs. Ledingham. Do you know where Mrs. Ledingham had been immediately prior to the accident? Do you know of your own knowledge where she had been?

A. I think she was in the check stand waiting on trade. [272]

Q. And am I correct in this, that you and Mrs. Ledingham assisted her to her feet?

A. Yes, sir.

Q. Now, did you have any conversation there with Miss Murphy at that time?

A. Not that I can remember, I don't think I said anything to her.

Q. Do you recall Mr. Frazer coming on the scene at any time? A. Yes, sir.

Q. And approximately how long after you had Miss Murphy up would you say Mr. Frazer showed up? A. I would say immediately.

Q. Now, in your assisting Miss Murphy up, did you slip or slide or anything like that yourself?

A. No, sir.

Q. Do you know if Miss Ledingham did?

A. I don't know, but I don't think she did.

Q. Did you see her? A. Did I see her——

Q. Slip or slide or apparently have any difficulty? A. No, sir.

Q. Now, thereafter what happened, after you

(Testimony of Albert Squires.)

had Miss Murphy up and Mr. Frazer came along, do you recall what happened then? [273]

The Court: Counsel, may I interrupt, I think it is time for the Court to take a recess. (Jury admonished.) Court will stand in recess until quarter of three.

(10-minute recess.)

The Court: You may continue.

(Last question read back by Reporter.)

A. Well, if I remember right, I immediately checked the floor to see what condition the floor was in.

Q. You said you checked the floor?

A. Yes, sir.

Q. Describe to the jury how you so-called checked the floor?

A. Well, I looked all over the floor in that immediate vicinity there.

Q. What did you see?

A. Well, I just seen the floor in the same condition it would exist throughout the rest of the store.

Q. Did you see any foreign substance, any liquid? A. No, sir.

Q. Any water or any foreign substance whatsoever? A. No, sir.

Q. Did you notice any slip or slide marks?

A. No, sir.

Q. Heel marks? A. No, sir.

(Testimony of Albert Squires.)

Q. Then what happened after that, Mr. [274] Squires?

A. Well, Mr. Frazer was there, and he takes charge of anything like that and I walked away.

Q. You went back to your job?

A. Yes, sir.

Q. When you left, was Miss Murphy still standing there near where she had apparently fallen down? A. Yes, sir.

Q. And Mr. Frazer, was he there?

A. Yes, sir.

Q. Was anybody else there that you recall?

A. Tom Hart and Fred Stromseth.

Q. Now, is Tom Hart the same fellow that was working with you at the north end of that aisle?

A. Yes, sir.

Q. And Fred Stromseth, who is he?

A. He is employed at the Safeway on East Granite.

Q. Now, did anybody leave that area along with you, leave with you when you went back to your job?

A. I think Tom Hart did because he was working with me.

Q. And thereafter did you see what occurred, or what is the fact, as to Miss Murphy and Mrs. Ledingham and Mr. Frazer? Did you pay any attention after that to them? A. No, sir.

Q. You went back to your work at the north end of the aisle? A. Yes, sir. [275]

Q. Did you ever inspect Miss Murphy's head,

(Testimony of Albert Squires.)

look at the bump? A. No, sir.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Why did you check the floor after Miss Murphy fell?

A. Well, because that's my job.

Q. So that every time anybody falls in the store close to where you are, you are supposed to go and check the floor and see that it is all right, is that true? A. Most of the time, yes.

Q. And do you have to do that frequently?

A. No, we don't have many people fall.

Q. But you do have some fall, is that correct?

A. None that I know of which would be any fault of the floor.

Q. Well, the question is, have others fallen and you have checked the floor after they have fallen?

A. Yes, sir, one.

Q. You said Mr. Frazer usually takes charge in a situation like that, is that correct?

A. Yes, sir.

Q. Have you seen him take charge in other cases of people [276] falling in the store?

A. Well, it's not just falling. Anything that might come up, I usually go along with Mr. Frazer for the experience.

Q. You have been with Mr. Frazer when he has taken charge when people have fallen in the store, is that correct?

(Testimony of Albert Squires.)

A. Not when anyone has fallen.

Q. Not when they have fallen?

A. I can't remember anyone that has ever fallen.

Q. Well, you testified earlier that you checked the floor because that was your job, you checked the floor after other people have fallen, is that true, or isn't it?

A. Well, you have got me a little confused. There was just one incident where someone had fallen, but it wasn't the fault of the floor.

Q. That is a matter that can be determined, but where did that fall take place? Did it take place anywhere in this vicinity? A. No, sir.

Q. It was in another part of the store?

A. It occurred in the produce department. It was the fault of a grape.

Q. The produce department is right next to where Miss Murphy fell, is that correct? Isn't this the produce rack over here to the left on Exhibit No. 9? A. Yes, sir. [277]

Q. And you show that she fell within a matter of, the way you have it marked, assuming these are nine-inch squares, it would be within about two and a half or three feet from the produce, the corner of the produce department, would it not?

A. No, it wouldn't be that close because in January we have moved this whole produce stand to the north.

Q. Which way is north?

A. Towards the aisle.

Q. So the produce department is now closer to

(Testimony of Albert Squires.)

the aisle in which Miss Murphy fell than it was in 1958, is that correct?

A. It is closer now, yes, sir.

Q. And that change was made since June 24, 1958? A. Yes, sir.

Q. Now, you and Mr. Frazer disagree as to where the coffee—for the benefit of the jury, the witness, I believe, has indicated that on June 24, 1958, the produce stand was back to the left on this picture by some little distance, is that correct?

A. Yes, sir.

Q. Further than it shows here. Now, it's your testimony, and you seem to disagree with Mr. Frazer, Mr. Frazer said on Exhibit 9 that the coffee display on June 24, 1958, was in the area marked with the pencil, and as I understand it, you say that it was exactly on the opposite side of the aisle, is that correct? [278]

A. Well, yes, sir, but could I clear up one point on that?

Q. Yes, sir, go right ahead. You have a right to explain your answer.

A. At that particular time of the year, we were changing the whole store over, and as close as I can remember, we hadn't had it moved over there yet, but as far as that goes, sir, the exact date when we did move it, I couldn't say for sure.

Q. But at some time around that time the coffee was on the right hand side of the aisle instead of on the left hand side, is that correct, as you go down?

(Testimony of Albert Squires.)

A. No, before it was here, it was all the way over on the other side.

Q. Well, if Miss Murphy and Mr. Frazer both testified that it was on the aisle indicated on Exhibit 9 on June 24, 1958, would you think they might be right?

A. It very well could have been.

Q. Now, Mr. Frazer puts Miss Murphy standing up where the "1" is marked on Exhibit 9, and you put her over two or three feet to the right. Now, having in mind that Mr. Murphy came up after she was standing up——

A. Mr. Frazer?

Q. Mr. Frazer I mean, could you say whether or not that would be the position in which she was standing when he got there?

A. Well, like I say, it was right in that vicinity. As far [279] as marking the exact spot, I can't do that.

Q. Now, isn't it a fact that when you got there and Miss Murphy was just getting up, actually her body was alongside and parallel with the produce stand?

A. No, I don't think it was alongside the produce stand.

Q. What about her head?

A. No, I think her head was more over this way (indicating).

Q. And you are indicating in front of where there is now a coffee display which everybody agrees was not there on that particular date? You indicated

(Testimony of Albert Squires.)

that her feet were towards you as you came down the aisle, is that correct?

A. That's all I could see, if I remember right, was just her feet.

Q. And so you would think that she was lying more crosswise of the store, is that correct, rather than lengthwise? A. Yes, sir.

Q. Have you any accurate or reasonably accurate estimate of how close Miss Murphy was to the beginning of the display counter on the right as you go down the aisle? I have in mind to this corner (indicating). As I understand, these things (indicating) stand out from the display, is that correct, these advertised specials, is that correct?

A. Yes, sir, but I don't think at that time there was anything piled there like that.

Q. Now, with that in mind, do you still think your mark is [280] correct if you only saw her feet if she was lying crosswise, or do you think that she was probably closer to that display counter on the right?

A. Well, I don't think she was too close to the display counter.

Q. Well, Miss Murphy is a small person, and if she was not very close to the display counter and you said she fell with her feet towards you, wouldn't she have had to have been closer to this counter than your mark indicates, or you would have seen all of her, would you not?

Mr. Poore: To which we object as argumentative.

(Testimony of Albert Squires.)

The Court: Overruled.

A. Well, there is an awful lot of area there, and when you are standing down one of them aisles, well, like I was that day, all you could see was just her legs.

Q. And according to your mark here, and counting the squares, there is 9, there is 1, 2, 3, 4, 5, 5 squares, that would be 45 inches, and Miss Murphy, I think, has testified that she is just a little over 5 feet, and if she was lying more or less crosswise, and you could only see her feet, the way this thing is set up, she must of necessity been a lot closer to the display than you show her, would she not?

A. Not if her legs were here and her body was right there at a kind of an angle like that (indicating).

Q. Well, now, which angle was she at? [281]

A. Well, I don't know for sure, all I could see was her legs.

Q. Well, did her legs come at you from the west or from the east?

A. I would say they went to the northwest.

Q. Now, would you indicate where her head would have been with her feet in that position on this Exhibit 9?

A. Well, I would say right about here (indicating).

Q. And you are pointing now directly—so that if her head was in this direction, actually what you would have seen—yes, I guess you show that her head would have been—will you mark that with a—

(Testimony of Albert Squires.)

let's see if you can make a "Y" that counsel can recognize. I know that I could not.

(Witness does as requested.)

Q. You have marked on—do you want to put a circle around that, too, so they all have circles?

A. I am assuming that this was where her head was because I didn't see her head, I am just assuming that.

Q. Well, now, if this—put a circle around that anyway, and we will talk about it.

(Witness does as requested.)

Q. Now, if this temporary display, this coffee display were not there, and if her head was where you actually indicate, there would have been nothing to have obstructed your view of her head, would there, you should have been able to see all of [282] her if she were in that position?

A. No, I didn't, though.

The Court: Well, let me ask one question with reference to that. May I see it, please, just a moment?

Mr. Erickson: Yes.

The Court: Oh. I was going to ask is there any part of a display counter behind where the coffee is displayed there? Is this the end of the display counter that's on that aisle (indicating)?

A. Yes, but it wasn't at that time. Those are new displays on that end.

(Testimony of Albert Squires.)

The Court: I just wanted to ask if there was anything on the other side of these specials?

A. I remember now what was here on this end.

Q. (By Mr. Erickson): What was it?

A. There was a nylon stocking rack and it was pretty big.

Q. Did it jut out into the aisle?

A. Yes, sir.

Q. You have indicated on the exhibit that there was a nylon stocking rack at the end of the display counter on the right hand side as you go down the aisle, is that correct? A. Yes.

Q. And that did jut out into the aisle?

A. Yes, sir.

Q. How far out? [283]

A. Not very far.

Q. Did it jut out as far as these displays, this special coffee display?

A. I don't remember if it did or not. I couldn't tell you for sure how far it was out.

Q. Now, you say the floor seemed to you to be the same in this particular locality as it was in the rest of the store, and the fact is that the floor is worn differently in different parts of the store, and was on June 24, 1958?

A. Just what do you mean by worn, like some spots are worn more that others?

Q. Yes.

A. Gee, I don't think so, they all seem to be pretty much the same.

(Testimony of Albert Squires.)

Q. Well, now, you were—were you at the store today? A. Yes, sir.

Q. Do you recall a couple of feet away from the main entrance there is a rather large, maybe a foot and a half across, patch that is worn clear through to the concrete? A. Gee, I don't recall.

Q. Do you recall that immediately in front of the present produce counter there is a patch in the floor about four inches square, and I am indicating, it may show on this Exhibit 10, I think it is about at that location right in front of the produce department? It isn't a whole tile, it's [284] just a part of a tile, do you recall that there is such a tile?

A. No, sir.

Q. And if there is, you have not observed it, is that correct? A. Yes, sir.

Q. And I am indicating on Exhibit 10 a dark mark on the photograph just in front of the produce counter. Can you say whether or not there is along this main aisle going in front of the checking stands right opposite where the carriages are now, do you recall whether or not there is a patch also there in the floor?

A. I recall one patch there, yes, sir.

Q. Is that where the turnstile once was?

A. Yes, sir.

Q. So that when you say that the spot that Miss Murphy was was exactly the same as the rest of the store, the floor, you are not so sure about that, are you?

(Testimony of Albert Squires.)

A. Well, I thought you were talking about the condition of the floor.

Q. I am.

A. I didn't quite understand that you meant how it was worn. Right there that area you are talking about, I don't think it is worn at all.

Q. As a matter of fact, that's in real good shape compared to the main entrance, is it not? [285]

A. Well, it's in good condition.

Q. And the tiles are not nearly as much worn there as they are coming from the door to the produce counters, is that correct?

A. Yes, sir.

Q. As a matter of fact, it is true, is it not, that the tiles coming from the main entrance until you get around by the carts, and until you get to almost the spot where Miss Murphy fell is very much more worn than the rest of the floor, isn't that true?

A. No, I wouldn't say it was very much more worn.

Q. It is more worn, though, is it not?

A. Well, right there, you are getting more traffic right there than you are in the rest of the store.

Q. That's right, and as a matter of fact, when you go into the store today, it is very obvious to you, is it not, that that does receive more traffic, there isn't the shine on the floor, and the tiles look rather pulpy and beat up, do they not, until you get past that produce counter?

A. No, they don't look beat up to me.

(Testimony of Albert Squires.)

Q. They look considerably more worn than where Miss Murphy fell, isn't that true?

A. Well, I would just say they have more traffic on them. I wouldn't say they were worn.

Mr. Erickson: That's all—oh, one further question. [286]

Q. You said you heard a noise, did you hear Miss Murphy fall? A. I believe I did.

Q. She hit her head a considerable bump, do you think that's what you heard?

A. No, I think I heard a noise that's out of the ordinary noises that you hear around the store.

Q. And you indicated that you were some 30 or 40 feet from her, but still heard the noise.

A. Yes, I heard the noise.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Poore:

Q. Would you say that Miss Murphy's body the way you have Xed and Yed in there was roughly in the center portion of that intersection where the aisle and the supply counter come together?

Mr. Erickson: To which I will object because the question is leading.

The Court: Sustained.

Mr. Poore: Well, would you—well, you have already indicated. I have no further questions.

(Witness excused.) [287]

THOMAS HART

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name, please, to the Court and jury? A. My name is Thomas Hart.

Q. Where do you live, Mr. Hart?

A. 1940 Locust Street.

Q. And here in Butte? A. Yes, sir.

Q. What is your business or occupation?

A. I am a food clerk at Safeway on Granite Street.

Q. Are you married? A. Yes, sir.

Q. Do you have a family? A. Yes, sir.

Q. How long have you been employed by Safeway? A. Close to six years.

Q. And on June 24, 1958, were you so employed? A. Yes, sir.

Q. What was your job then, Mr. Hart?

A. I was a food clerk.

Q. Do you recall an accident about that time involving a Miss Murphy, the plaintiff here in court? [288] A. Yes, sir.

Q. What was the first that you knew about that happening, the happening of that matter?

A. After she had fallen.

Q. Now, where were you at that time, Mr. Hart?

A. Up the third aisle about half way, checking stock.

Q. Were you working with anybody?

(Testimony of Thomas Hart.)

A. Yes, sir.

Q. With whom were you working?

A. Al Squires.

Q. Did you see Miss Murphy fall?

A. No, sir.

Q. Did you hear anything? A. Yes, sir.

Q. Would you describe that to the Court and jury?

A. It was like someone dropped something, or something like that.

Q. Something attracted your attention?

A. Yes, sir.

Q. What did you see?

A. We turned around and looked down to where the noise came from, and we seen her, or I seen her laying there.

Q. Would you describe to the Court and jury what you saw of Miss Murphy?

A. Well, at the time I just seen her laying there. I can't [289] remember if she was starting to get up or anything else. I do remember her laying there.

Q. And what did you do then?

A. I stopped what I was doing and I walked down there, and she was being helped to her feet.

Q. Who was helping her to her feet, do you recall? A. Al Squires and Mrs. Ledingham.

Q. And whereabouts in the store was that where they were helping her up, do you recall?

A. Well, by the produce rack, the north end of the produce rack and the starting of this third aisle.

(Testimony of Thomas Hart.)

Q. Do any of these pictures which are exhibits in the case, Mr. Hart, show the area where you saw Miss Murphy being helped up?

A. This one here would be more my view of it.

Q. Now you are referring to Defendant's Exhibit No. 10, and you have referred to a produce counter. Does that show in that picture there, the produce counter that you are referring to?

A. Yes, sir, it is a dry rack.

Q. And whereabouts on the floor would you indicate that Miss Murphy was being helped up when you saw her?

A. Well, it is right in this approximate area here (indicating). I can't remember for sure.

Q. In the area where the two aisles seem to merge one into [290] the other? A. Yes.

Q. And when you saw her being helped up, you said that Mrs. Ledingham and Mr. Squires were apparently helping her up? A. Yes, sir.

Q. Did you assist them in helping her up?

A. No, sir, I didn't.

Q. And did you stay around there and talk to Miss Murphy, or what developed after you saw her being helped up?

A. No, sir, I didn't stay around there, I went back to my job. She was getting help then, so——

Q. You didn't have any conversation with her?

A. No, sir.

Q. You didn't feel the bump on her head or any such thing? A. No, sir.

Q. Did you make any examination of the floor?

(Testimony of Thomas Hart.)

A. Well, later I was walking around there and I looked at the floor.

Q. After she had already gone?

A. Yes, sir.

Q. Approximately how long after she had left did you look at the floor?

A. Oh, I can't remember, it was maybe 15 minutes, maybe a half an hour.

Q. And did you notice anything unusual about the floor? [291] A. No, sir.

Q. Now, did you run all the way up to where Miss Murphy was, were you right up to where they were?

A. Right to the head of that aisle there.

Q. In that area did you notice any slippery condition, slip yourself? A. No, sir.

Q. Did you see anybody else slip? A. No.

Q. Then, as I understand it, after getting up to the head of the aisle and seeing somebody else was helping her up, you went back to your job?

A. Yes.

Q. At that time was Mr. Frazer there?

A. Yes, sir, he had just arrived, I think.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. You were closer to Miss Murphy than Mr. Squires was, were you not?

A. I don't think so. You mean in the aisle?

(Testimony of Thomas Hart.)

Q. Yes, to where Miss Murphy was.

A. No, sir, I think we were standing pretty much together there. [292]

Q. Did he go ahead of you down the aisle?

A. Yes, sir.

Q. But you testified when you saw her, she was lying down? A. Yes, sir.

Q. Can you say whether she was lying on her back or not? A. Not for sure.

Q. Her feet were headed in your direction, were they not? A. Yes, sir.

Q. Could you see her whole body while she was still on the floor?

A. Well, as far as I can remember, it was just her feet pointed towards myself. I can't remember if I could see her whole body or not.

Q. Did she sit up while you were approaching?

A. She was starting to get up after I——

Q. And do you recall how she was getting up?

A. No, sir, I don't.

Q. Well, that is quite an unusual thing, isn't it, to come up to someone that has fallen in the store?

A. Yes, it is.

Q. But you didn't notice how she was getting up or exactly how she was lying, is that correct?

A. No, sir.

Q. Now, you testified you heard a noise, and you said it was like something falling. Would it be a thud, would that be a [293] good way to describe it?

A. Well, it could be described as that, maybe not quite so blunt as that.

(Testimony of Thomas Hart.)

Q. How far away from Miss Murphy were you when you heard that noise?

A. Well, I was half way up the aisle. I don't know the exact length. I would imagine it was around 20 feet, 25.

Q. Now, with relation to the length of the courtroom, will you pick an object and tell us as best you can with relation to that object how far away you were?

A. Well, I would say about three-quarters of the distance, maybe a little closer.

Q. Of the length of the building?

A. Yes, sir.

Q. But you still heard the noise?

A. Yes, sir.

Q. How loud was that noise?

A. Well, it was enough to attract my attention.

Q. And you were not watching in that direction, no reason to be looking in that direction?

A. No.

Q. Can you say whether or not the particular area where Miss Murphy was lying, whether the floor, the tiles themselves were in pretty good shape?

A. They seemed to be in good shape. [294]

Q. Would you say they are less worn there than they are in other portions of the store, having reference particularly to the entrance?

A. Well, it is less worn than the entrance.

Q. You heard my examination of Mr. Squires, did you not? A. Yes, sir.

(Testimony of Thomas Hart.)

Q. And I called his attention to a worn—three different worn spots, one of them worn and two of them patched. Are you familiar with those spots on the floor as they exist today?

A. No, sir, I am not.

Q. Are you familiar with the worn spot right in front of the door which Mr. Frazer says exists?

A. Yes, sir.

Q. You remember that? A. Yes, sir.

Q. What about the spot where the turnstile was taken down. Do you recall a spot like that?

A. Well, I remember the turnstile or the rail that used to be there.

Q. But you don't remember the patch in the floor that is there now? A. No, sir.

Q. Do you remember a patch right in front of the produce counter, a small one, maybe three or four inches square? [295]

A. No, sir, I don't.

Q. Do you try generally to observe the condition of the store and particularly the floor as part of your work?

A. Well, I do more work on the shelves and that, and they usually have after-school boys to sweep up the floor and that.

Q. So that in your regular work in the store, you don't observe generally the condition of the floor, except perhaps if it were terribly dirty or something like that, is that a fair statement?

A. Yes, sir.

Q. And in your examination of the floor on this

(Testimony of Thomas Hart.)

particular date, in view of your rather casual interest in the condition of the floor, are you in a position to testify that it was cleaner or dirtier or anything else at the spot where Miss Murphy fell than it usually is or is not?

A. Well, there were no foreign objects, I remember that.

Q. Do you recall that the floor seemed to be clean and shiny? A. Well, it was clean.

Q. What about being shiny?

A. I can't remember if it was shiny or not.

Q. You have been working there for some time, and you know that the floor is waxed on Tuesdays and Friday Nights, is that correct? If it is waxed on Tuesday and Friday nights, which is the testimony, do you think that would probably be the [296] nights it is waxed?

A. Friday nights it is, or I can't remember the exact nights they are. I know they are waxed at night during the week.

Q. Can you say whether or not in the morning following the waxing that the floors are shinier and brighter than they are the days following nights when they are not waxed?

A. They look cleaner.

Q. What about being shiny?

A. I imagine they would be with the wax on them.

Q. The manager, Mr. Frazer, testified that the wax tended to wear out in the center of the aisles

(Testimony of Thomas Hart.)

faster than it did on the sides. Have you observed that?

A. Yes, sir, because one night we cleaned the floor that I can remember.

Q. How long ago was that?

A. Oh, that's, oh, about six months, seven months ago, I think.

Q. And what did you do to clean the floor?

A. We mopped the floor, we didn't wax it, though, we just mopped it.

Q. When you say "we," who is that?

A. Myself and Fred Stromseth.

Q. And did you make any particular effort to remove the excess wax wherever it was?

A. No, sir. [297]

Q. This was in addition to what Mr. Rodoni does, is that correct? A. Yes, sir.

Q. Did you use any preparation other than soap and water?

A. No, sir, just soap and water.

Q. It was for the purpose of removing excess wax, is that correct?

A. Well, it was to get the dirt off the floor.

Q. Now, with particular reference to the area right next to the display counters and out of the exact center, were you working particularly on that area, were you working on the edges more than you were the center of the aisles?

A. Well, there was a lot of dust on the floor, and we just swung the mop from side to side down the aisle.

(Testimony of Thomas Hart.)

Q. It wasn't for the purpose of removing the old wax?

A. No, sir, it was to remove the dirt and dust.

Q. Now, in that mopping, you say you generally don't do that, did you notice whether or not there was more wax in any particular portion of the aisles or floor than on other portions?

A. No, sir, I didn't.

Q. You are sure that Miss Murphy's feet were pointed toward you in whatever position she was lying, is that correct? A. Yes, sir.

Mr. Erickson: That's all.

(Witness excused.) [298]

DR. JAMES G. SAWYER

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name to the Court and the jury, Doctor. A. James G. Sawyer, M.D.

Q. What is your business or occupation, Doctor?

A. I am a radiologist.

Q. And where are you employed, or where do you work?

A. At the St. James Hospital and Butte Community Memorial Hospital in Butte.

Q. And particularly with reference to St. James Hospital, are you in charge of any records of that hospital?

(Testimony of Dr. James G. Sawyer.)

A. I am in charge of the X-ray records, yes, sir.

Q. And who is the chief person in charge of X-rays down there?

A. I am in charge of the department.

Q. You are in charge of the department. How long have you been in charge of the department, Doctor?

A. About two and a half years.

Q. And what has been your experience in the taking and reading of X-ray films?

A. You mean my experience as a radiologist?

Q. Yes. [299]

A. I have been doing radiology about 20 years.

Mr. Erickson: We will admit the doctor's qualifications.

Q. Now, have you been subpoenaed to produce here in court the X-ray films of a Miss Mildred Murphy? A. Yes, sir.

Q. And you have them with you?

A. Yes, sir.

Q. May I have them? A. Yes, sir.

(Witness produces films.)

Q. Doctor, I hand you Defendant's Proposed Exhibit 14, I believe—13, excuse me—13 through 29, inclusive, and ask you if you know what those X-rays and records are?

A. Yes, sir, they are a series of films taken on Mildred Murphy, and the copy, or the original copy of the interpretation of the films.

(Testimony of Dr. James G. Sawyer.)

Q. Now, have those been in your care and custody and control since they were taken?

A. Yes.

Q. Were they taken with standard photographic equipment? A. X-ray equipment.

Q. Excuse me, standard X-ray equipment?

A. Yes, they were.

Q. And do they truly and accurately portray the portions of the plaintiff's body that they are intended to portray? A. Yes. [300]

Q. Taken under your supervision and control?

A. Yes, sir.

Q. And the report itself, a report of the examination of the X-rays?

A. This is not my interpretation on the written report. My associate, Dr. Hammer, interpreted the film.

Q. Is that a portion of—is that the file of Miss Mildred Murphy in your office and in the X-ray department? A. That's right.

Mr. Poore: We offer in evidence Defendant's Proposed Exhibits 13 through 29, inclusive.

Mr. Erickson: I don't believe you have asked him when these pictures were taken.

Q. When were they taken, Doctor?

A. May I have the card, please? The first series was of the skull dated June 24, 1958, the next was films of the cervical and dorsal spine dated June 27, 1958——

Mr. Erickson: Maybe I can speed these along. On these films there seems to be a date on each

(Testimony of Dr. James G. Sawyer.)

one, is that the correct date on which they were taken?

A. Yes, sir, they are all dated, yes, sir.

Mr. Erickson: That would be sufficient then. I would have no objection on the date. I have no objection.

The Court: They are admitted. You offer what?

Mr. Poore: The entire group. [301]

The Court: 13 to what?

Mr. Erickson: I would have no objection to——

The Court: To 29?

Mr. Erickson: No. That is the report made by Dr. Hammer.

The Court: Very well, they are admitted, each of the exhibits.

(Defendant's Exhibits 13 to 29, inclusive, admitted.)

Q. Now, Doctor, would you mind using this shadowgraph here and stepping down and identifying these various exhibits as to what portion of the anatomy they are, and what, if any, pathology is shown in the X-ray?

A. You wish me to testify myself as an expert?

Q. Yes, I do.

A. Shall we take them in order?

Q. Well, it might be in logical order if we can get the cranium and then work on down.

A. You got them all mixed up.

Q. I am sorry.

A. Now, we have four views of the skull which

(Testimony of Dr. James G. Sawyer.)

were taken on June 24, 1958. These are two side to side views, one to each side, and we have a back to front view, that is, from the back to front with the patient lying flat on the table, and here is a front baser view, or somewhat of a front to back view——

Mr. Erickson: May I interpose a question as to the numbers of these? [302]

Mr. Poore: Yes. Maybe we could start again, Doctor——

Mr. Erickson: It isn't necessary if I know the numbers.

A. These are numbers 15, 16, 17 and 18.

Q. (By Mr. Poore): Now, would you mind putting each one in—referring now to Exhibit No. 15, do you notice there, Doctor, is there any evidence of any abnormality, fracture, or pathology whatsoever?

A. No, sir, this is a perfectly normal X-ray study in this view of the skull.

Q. Now, placing in the shadowbox No. 16, would you state what that is and whether there is any abnormality there, Doctor?

A. That is a front to back view, or a front to basilar view, in other words, where the patient is lying flat on the table, and the X-ray is centered in this area of the skull (indicating) and comes out this area (indicating). It is a semi, so-called, basilar, view, and it is within the limits of normal. This is No. 17. That is a right to left lateral or side to side view with the left side against the film, and

(Testimony of Dr. James G. Sawyer.)

this is within the limits of normal. This is No. 18. This is a left to right side to side view with the right side of the skull next to the film, and this is within the limits of normal.

Q. Now, Doctor, are there any X-ray films here to indicate the cervical spine, namely, the neck area?

A. Yes. These are two views of the cervical spine, or the [303] portion of the spine in the neck.

Q. Doctor, is there any indication in that X-ray of a compression fracture or any other type fracture? Will you please look carefully?

A. There is no evidence of a fracture, old or recent, in this study.

Q. Is there any evidence of any abnormality?

A. There is a narrowing of the fifth cervical vertebral space. If the spaces above and below are compared with this space (indicating), it can be readily seen that this is narrower.

Q. You are referring to Exhibit No. 19, is that correct?

A. This is 19, and the other one is 14. There are also noted some what we call productive changes. By that we mean spurring along the margins of these vertebrae. You can see these sharp pointed projections from the margins of these vertebrae (indicating), and they affect chiefly the lower portion of the cervical spine, and we consider this evidence of degenerative arthritis, or so-called old-age arthritis.

Q. Now, is the narrowing of the intervertebral

(Testimony of Dr. James G. Sawyer.)

joint space between the—is it between the fifth and sixth cervical?

A. It is between the fifth and sixth cervical vertebral bodies.

Q. Is that an abnormal condition?

A. That is abnormal, and in my opinion, it is a sign of [304] degeneration of the disc, that is, the soft, cushiony material between the bodies of these vertebrae, which is not uncommonly seen with this type of arthritis, and it denotes the same sort of disease process as osteoarthritis or degenerative arthritis.

Q. May I ask a question for a point of clarification? On the vertebrae, wouldn't that be between the fourth and fifth, or how do you start counting?

A. This is the first here, second, third, fourth, fifth and sixth. This is the sixth (indicating).

Q. Doctor, would you say that that abnormality was caused by disease rather than trauma?

A. In my opinion it is, yes, sir.

Q. What was the date, Doctor, that this picture was taken?

A. This was taken June 27, 1958.

Q. Is there any way that an expert in your profession can determine how long this degenerative process between the fifth and sixth cervical vertebrae has been going on as of the date the X-ray was taken?

A. How long before this film was taken?

Q. Yes.

(Testimony of Dr. James G. Sawyer.)

A. I would say roughly from six to seven years. I can't say exactly, but it would be a matter of several years, at least.

Q. Would you indicate on Defendant's Exhibit 14 if that also [305] shows the same abnormality or narrowing of the intervertebral joint spaces shown on the prior exhibit?

A. Not quite as well. There is a little question of narrowing here (indicating), but it can't be brought out as well as in this side to side view.

Q. In other words, it appears, but it doesn't appear as clearly? A. It is not as clear.

Q. There is no evidence of any old or present or recent fracture, as I understand your testimony?

A. None whatsoever.

Q. Now, would you take the next series working down the patient's body?

A. This is No. 13 and No. 20. These two views go together.

Q. Explain what area of Miss Murphy's body is shown there, Doctor?

A. These are opposite views, or this is a side to side view of this portion of the spine in the chest area, that is, the so-called dorsal spine. This is a front to back view of the same portion of the spine (indicating).

Q. Now, Doctor, do you see any abnormalities in those X-rays?

A. There is evidence of degenerative arthritis just as was demonstrated in the cervical spine, as evidenced by the spurring along the margins of

(Testimony of Dr. James G. Sawyer.)

these vertebral bodies (indicating). Practically all of them all the way down have it, but [306] especially in the mid-portion of this part of the spine. These vertebrae show this spurring process (indicating).

Q. What is degenerative arthritis, Doctor?

A. That is, I think, the best way to explain that. It is a wear and tear arthritis. The joints of the body are just like parts of machinery. They age and become rough and wear down just like parts of a machine would.

Q. Would those abnormalities be of traumatic origin?

A. They can be, but it would not appear as such, in my opinion, here, as you see it here, because the entire dorsal spine appears to be involved with this. If a so-called—now, in case of injury, you can get similar changes, but you have signs of an injury of the bodies. You also have the changes due to arthritis, the so-called traumatic arthritis, or arthritis due to injury, quite well localized to a certain portion of the dorsal spine. It would not involve the entire dorsal spine.

Q. How long would you estimate this degenerative process has been going on as of the time of this X-ray?

A. A matter of several years, a matter of six or seven or eight years, I don't know.

Q. What is the date of the taking of that X-ray? A. June 27, 1958.

(Testimony of Dr. James G. Sawyer.)

Q. Do you notice any narrowing of any joint spaces in the dorsal spine? [307]

A. No, sir, not in this portion of the dorsal spine.

Q. No evidence of fractures? A. No, sir.

Q. You are calling attention to arthritic changes, which is the only abnormality you see there?

A. In this view—may I show this?

Q. Certainly.

A. In this view here, there is a little bit of what we call scoliosis. By scoliosis, we mean curvature of the spine to one side or the other. As you can see here (indicating), this spine is not perfectly straight, and you can see a little curvature toward the right side here—this is the right side (indicating). That is not uncommon. Possibly the arthritis has something to do with that; it may be what we call a postural thing, due to poor posture. It is difficult to say exactly the cause of that.

Q. Would it be traumatic in origin, a recent injury as of that date?

A. Not in my opinion. It is something that comes on in a matter of years.

Q. Doctor, explain the rest of the X-rays going down the plaintiff's body? Doctor, while you are looking at those, may I ask you a question?

A. Yes, sir.

Q. For what physician were these X-rays [308] taken?

A. They were taken for Dr. Rotar, at his request. Now, these are Exhibits, or this is Exhibit

(Testimony of Dr. James G. Sawyer.)

21, first which is a side to side view of the skull with the left side against the film.

Q. Do you notice any abnormality there, Doctor?

A. No, sir, this is perfectly normal. This is No. 24. It is a side to side view of the skull with the right side of the skull next to the film.

Q. Does that show the fifth and sixth cervical vertebrae and the narrowing of the disc between them?

A. Well, it shows it, but not quite as plainly. This would be the space in here (indicating), but it is not a true vision.

Q. It wasn't designed to illustrate that?

A. This is centered over the skull itself.

Q. Would you state whether there is any pathology or abnormality there?

A. No, sir, this is within the limits of normal. No. 23 is a front to basilar view of the skull, or front to back, just as I showed before, and I don't see anything of any significance there. No. 25 is a back to front view of the skull with the forehead against the film, and that is within the limits of normal. Next, the next two exhibits are 22 and 26——

Q. When were these taken, Doctor?

A. These were taken September 26, 1958, and they represent [309] two views of the cervical spine, or the spine in the neck.

Q. And do you notice any abnormality there, Doctor?

A. Yes, there is a slight, this narrowing of the

(Testimony of Dr. James G. Sawyer.)

intervertebral space here (indicating), or the space between the bodies of the fifth and sixth cervical vertebrae, it is the sixth intervertebral space, and there are these projections along the margins of the vertebral bodies which are, in my opinion, due to degenerative arthritis; and this (indicating) is the opposite view of the cervical spine, and it shows nothing too much significant in this view. Most of the disease process is seen best in this view (indicating).

Q. Thank you.

A. The next two exhibits are 27 and 28, and represent the opposite views—this is the side to side view and this the front to back views (indicating) or the dorsal spine. This is the portion of the spine in the chest area.

Q. And does that show anything different—did you make any different medical conclusion from those than from the previous X-rays of the same area?

A. The findings are very much—are exactly the same as far as I am concerned, exactly as noted in the previous X-rays of this portion of the spine. They show the degenerative arthritis, and in this view you can see a slight curvature here (indicating). It is very minimal and it appears about the same. [310]

The Court: It's about time for a recess. (Jury admonished.) Court will stand in recess until four o'clock.

(10-minute recess.)

(Testimony of Dr. James G. Sawyer.)

The Court: You may proceed.

Mr. Poore: May Al Squires and the witnesses we have finished with, may they be permanently excused?

Mr. Erickson: I have no objection.

The Court: Very well, they may be excused.

Q. Doctor, referring then to the various X-rays that you have already interpreted for us as to the cervical or neck, and the dorsal spine, did you notice any traumatic arthritis or arthritis originating from injury?

A. Nothing that I would consider traumatic arthritis.

Q. Did you notice any difference in the arthritic changes in the dorsal and in the cervical spine?

A. You mean as to the type of arthritis?

Q. Yes.

A. No, sir, in my opinion, they are the same type.

Q. Now, Doctor, I hand you Plaintiff's Exhibits 1 and 5, which are in evidence. Would you place those in the shadowbox, and now, these pictures, does it show when they were taken?

A. I would say this is November 14, 1958.

Q. And then this other one would be April 7, '59, is that correct? [311] A. That is correct.

Q. Are those both cervical spine, Doctor?

A. No, sir, this is a side to side view of the cervical spine (indicating). This is a side to side view of the lowest, lumbar portion of the spine (indicating).

(Testimony of Dr. James G. Sawyer.)

Q. Well, excuse me, Doctor, I gave you the wrong one. Would you substitute that?

A. This one in No. 6, dated 4-7-59, and this is a side to side view of the cervical spine.

Q. Now, Doctor, were those X-rays taken at your office? A. No, sir.

Q. Have you ever examined them before?

A. No, sir.

Q. Now, would you——

The Court: Pardon me, what are the numbers of these exhibits?

Mr. Poore: These are the plaintiff's pictures, your Honor. These are Plaintiff's 1 and Plaintiff's 6.

The Court: Very well, proceed.

Q. Now, Doctor, do you notice any narrowing of the intervertebral joint space between the fifth and the sixth cervical vertebrae in these two X-rays?

A. Yes, sir. In this Exhibit No. 1, there is a narrowing of the fifth intervertebral space, and in Exhibit 6 there is similar narrowing of the fifth intervertebral space.

Q. And would you compare that narrowing of those two X-rays [312] with the narrowing that existed as you have testified on June 24, 1958? Is it any greater, any less, or any difference?

A. May I have the other ones, please?

Q. Yes, certainly.

A. In my opinion, the amount or degree of narrowing appears the same. I don't see any difference.

(Testimony of Dr. James G. Sawyer.)

Q. Is there any other change, any difference between the X-ray taken in your office, namely, as indicated by Defendant's Exhibit 26, and Plaintiff's Exhibits 1 and 6?

A. Well, there is a difference in the amount or the number of cervical vertebrae that are seen in this study here (indicating) as compared to these two. Now, I can see only a part of the seventh one in this study here (indicating)——

The Court: Referring to which exhibit?

A. No. 6, and in No. 1, I can see only part of the seventh cervical vertebra. The seventh cervical vertebra in this one (indicating) is brought out entirely. That is this vertebra right here (indicating). That is No. 26, and outside of that difference in the number of vertebrae, which is a matter of difference in technique, and the fact that these two films, Nos. 1 and 6, are lighter than No. 26 in technique, I don't see any difference in the disease process.

Q. Am I correct in this, then, Doctor, that there has been no more narrowing, in other words, no increase in the pathology or in the disease itself? [313]

A. In my opinion, no, sir.

Q. Now, Doctor, directing your attention to Plaintiff's Exhibits 1 and 6, do you notice any recent or old fractures there?

A. No, sir, I don't see any fracture at all in either Nos. 1 or 6.

(Testimony of Dr. James G. Sawyer.)

Q. Now, Doctor, did we have one there of the——

The Court: Let me ask a question, will you, please? You say on all of those exhibits that you have just been referring to there appears to be a narrowing of the intervertebral disc?

A. Yes, sir.

The Court: Now, is there any method available to the profession to measure that narrowing?

A. Well, it is a matter of—I am looking at this from a matter of experience——

The Court: Yes.

A. ——training and experience. I am comparing it just in my mind. These can be measured, they can be compared exactly, yes, sir, if these two films, Nos. 1 and 6, and No. 26 had been taken exactly——

The Court: From the same distance and at the same angle?

A. Under the same technical factors, yes, sir.

The Court: But without that you cannot exactly measure?

A. Not exactly to the millimeter, no.

The Court: In other words, if you took a picture of my neck [314] from one angle, and assuming there was some narrowing of a disc——

A. Yes, sir.

The Court: ——you might take a picture from one angle, and just from a little different angle, the disc would appear to be narrower than from the other angle?

(Testimony of Dr. James G. Sawyer.)

A. It could, yes, sir, from a matter of distortion.

The Court: Well, does the mere fact that there does seem to be some difference, it is not determinative of the matter, unless you can determine the other factors involved in the taking of the picture?

A. If I were interested in measuring it down to the millimeter and fractions of a millimeter, then I would have to have exactly the same conditions.

The Court: For the series?

A. Yes, sir, but in my opinion, the narrowing is quite obvious in these studies, it is so obvious and so gross that it makes no difference whether these were taken exactly under the same circumstances, I mean there isn't that much difference in the technique to make any difference.

The Court: Well, observing the general—I suppose that from your experience, Doctor, you can tell in general the angle of the picture?

A. Yes, sir, I can.

The Court: Of each of these pictures? [315]

A. Yes, sir.

The Court: And observing that, can you then tell whether there has been over the period of time from the first picture to the last picture any change in that narrowing of the disc?

A. Just looking at it on these films, I don't think there is.

(Testimony of Dr. James G. Sawyer.)

The Court: From your experience, that's where your experience comes in?

A. That's right, I don't think there is any difference.

The Court: Very well.

Q. (By Mr. Poore): Doctor, would you mind inserting Plaintiff's Exhibits 3 and 4 in the shadowbox? A. This is Exhibit 4.

Q. And, Doctor, I notice some little light patches there on what I imagine is the hip bone in Plaintiff's Exhibit 4, what are those light colored masses?

A. You are referring to these things here (indicating)?

Q. Yes.

A. Well, they may be probably one of two things, and most likely the second. First, I think they could be little foreign material in the bowel, pieces of bone, even pieces of pills, things like that may cast a shadow on the X-ray, and they are in such a position that they could be within the bowel. Another possibility is so-called calcification or calcific deposits, [316] deposits of calcium within the lymph nodes, which are quite numerous in this area of the abdomen and indicate the results of an old inflammation, perhaps an old appendicitis, and old adenitis—that is an inflammation of the lymph nodes. We see these very commonly, and 95 per cent of the time they are of no great significance.

Q. Now, Doctor, is there anything else in the shadowgraph, the X-ray, that appears abnormal or has any pathological significance?

(Testimony of Dr. James G. Sawyer.)

A. Well, there is a mild scoliosis or a curvature, a mild curvature of—this is the lumbar spine, the lowest portion of the spine, towards the right side.

Q. Is that the same scoliosis or mild curvature that you noted in the dorsal spine in your own X-ray?

A. It is a similar process, yes, and there are also some degenerative arthritic changes in this portion of the spine as evidenced by, you can see this little spurring here along these margins, sharpening of the edges, some in here, some in here (indicating). I don't know how severe it is without the other view, the side to side view.

Q. This may be the lateral view, no, it doesn't look like it.

A. No, it is the same view as this one.

Q. Very well. Then, Doctor, would you say that the scoliosis, the mild scoliosis was of a degenerative nature, or the [317] accidental injury type nature?

A. I would say it is probably of a degenerative nature. I can't tell exactly what has caused it, whether it is postural, or the result of arthritis, but I think it is something that has come on over a matter of years.

Q. Would you take a look at that, Doctor, and see if that is——

A. Here is one that is a little better.

Q. You are referring to Plaintiff's Exhibit 5?

A. This is Exhibits 5 and 2. They are both similar types of views, and they are side to side

(Testimony of Dr. James G. Sawyer.)

views of what we call the lumbosacral area, that is, the lower lumbar spine and the upper sacral spine, that would be in this part of the spine as seen in the other view, and in this No. 5, Exhibit 5, you are seeing the fourth and fifth lumbar vertebrae, and the upper portion of the sacrum, and in No. 2 are seen part of the third lumbar vertebra, fourth, and the fifth lumbar vertebrae, and part of the sixth.

Q. And, Doctor, in those pictures do you notice any pathology of a traumatic origin, in your opinion? A. No, sir, I don't.

Q. You may sit back there, Doctor. Would you say, then, Doctor, from your examination of these films that the degenerative arthritic condition ranges from the cervical spine to the lower lumbar [318] spine? A. Yes, quite definitely.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Dr. Sawyer, do you know who Dr. Clemmons is? A. Yes, sir.

Q. You have known him for some years?

A. Yes, sir.

Q. Do you recognize him as a qualified orthopedic surgeon? A. Yes, sir.

Q. And as a qualified orthopedic surgeon, he would be able to read X-rays, is that true?

A. He should be able to, yes, sir.

Q. And the questions Judge Murray asked you

(Testimony of Dr. James G. Sawyer.)

about reading X-rays indicates that even though they are photographs, we who are laymen cannot look at them and get very much of an idea of what they show, would that be a good statement?

A. I think—what are you referring to, anything specific?

Q. Yes, if I had a broken leg, which I had recently, I could see that it was broken, but as far as the spine is concerned, we laymen would be in a poor position to determine what a picture shows, is that correct?

A. You mean on your own without having——

Q. Yes. [319]

A. Yes, I would expect so, I spent many years learning that myself.

Q. And would you say that also was true of Dr. Clemmons? A. Yes, sir.

Q. And is it also true, Dr. Sawyer, that since what an X-ray shows is a matter of opinion, two qualified, competent radiologists, or orthopods—is that what you call them?

A. Orthopedic surgeons.

Q. Orthopedic surgeons might look at the same X-rays and come up with different opinions, isn't that correct?

A. That is possible, yes, sir. Two radiologists might have a difference of opinion, too.

Q. That's right, and if Dr. Clemmons found that in the lower dorsal, in Exhibits 2 and 5, Plaintiff's Exhibits 2 and 5, he found that there was narrowing, particularly toward the rear, between the sixth

(Testimony of Dr. James G. Sawyer.)

and sacrum, and you say you see nothing unusual about it, would that be a matter of a difference of opinion between the two of you?

A. I wouldn't consider these two views—are you referring specifically to these?

Q. Yes.

A. I do not consider these two views as sufficiently true lateral views, side to side views of this portion of the spine to give an opinion as to that sort of thing. Now, may I explain that [320] further?

Q. Yes. I didn't think any of your X-rays went that low.

A. They don't, but I can use something to illustrate.

Q. Yes.

A. This is, just as a matter of illustration, using Exhibit 19, which is a lateral view of the cervical spine. If this were a true lateral view, side to side view, of this portion of the spine with the central X-ray passing directly through this joint, which is the fifth lumbar here and the first sacral here (indicating), this should bring out the joint just as plainly as any of these are brought out. As you can see here (indicating), here is the lowest lumbar vertebra. In this view it is overlapping the upper sacral vertebra. In other words, this is not a true lateral view. This joint here (indicating) should be just as well defined without any overlapping if this were a true lateral view, it should appear just as distinct as this (indicating).

(Testimony of Dr. James G. Sawyer.)

Q. Does this X-ray show anything unusual in the amount of angle between the fifth lumbar and first sacral?

A. Nothing unusual, based on the fact that this is a distorted view of this portion of the spine. This is not a true lateral view.

Q. What about this one, No. 2?

A. The same applies, neither one of these are true lateral views.

Q. And would you say then that Dr. Clemmons would not be [321] qualified from an examination of those two to give an opinion as to whether there was a greater than normal angle between those vertebrae?

A. I don't see how you can give an opinion as to the conformity of a joint space, the true conformity, without a true lateral view.

Q. And that would be true of the angle between the sacral vertebra and the lumbar, because to me it looks like there is a very decided angle?

A. You cannot estimate angulation of this joint—are you referring to angle in relation just to the vertebrae?

Q. Yes.

A. You cannot estimate the true angle of this lumbosacral joint or the width and the contour, the outline of this joint here (indicating) in a distorted view like this. If I had a true lateral view of this joint, I could very easily illustrate the difference.

Q. Now, Doctor, assume that the patient, Miss

(Testimony of Dr. James G. Sawyer.)

Murphy, complains of a constant low back ache, right there at that particular area, that it has persisted for a year and a half and still persists, in studying an X-ray, if you had that in mind, would that be of any assistance in determining whether there might have been a narrowing, or is that outside of your field as a radiologist? Do you go only on the X-rays?

A. I can give an opinion as far as the patient's symptoms—— [322]

Q. Yes.

A. If I had a patient—may I answer it this way?

Q. Yes, go right ahead.

A. If I had a patient that complained of a low back pain, and I wanted to see the condition of this portion of the spine, I would have to have a true lateral view. If my first attempt at obtaining this view was like this, I would take another one changing the angle because that is what we frequently have to do. This is a difficult portion of the spine to X-ray properly and get a true lateral view, and many times we have to repeat two or three times to get a true lateral view, chiefly to determine the true width of that joint and its outline and its angulation.

Q. If the testimony of both Dr. Rotar and Dr. Clemmons is that that is disabling, a disabling situation so far as those vertebrae are concerned, would you have an opinion as to whether they are correct or not?

(Testimony of Dr. James G. Sawyer.)

Mr. Poore: Just a second, we recall the facts slightly differently as just incorporated in the hypothetical question. I don't believe there was testimony—I may be wrong, but I don't believe there was testimony by Dr. Rotar that there was this abnormality of the lower back.

The Court: He didn't base any opinion upon that, as I recall, but in any event, it is an improper question. It is not for the doctor to compare himself with the other doctors. He will [323] examine the picture and the other doctor can examine the picture. He doesn't have to be placed in the position of passing his opinion upon some other doctor, nor should any other doctor be placed in the position of passing his opinion upon Dr. Sawyer.

Mr. Erickson: I understood the rule to be different, that when an expert witness puts himself on the stand as an expert, that counsel would have the right to compare opinions and elicit from the expert who has held himself out in that field almost without limit in matters like that.

The Court: Well, if you want to cross-examine him with reference to whether or not the doctor is an expert, it may be that you could attack his expertness, the expertness of it, but for him to weigh the testimony of one doctor as against the testimony of his own opinion is obviously the question that the jury has to resolve, as I understand the situation.

Mr. Erickson: Yes.

Q. You took the X-rays for Dr. Rotar, did you not?

(Testimony of Dr. James G. Sawyer.)

A. They were taken under my supervision, yes, sir.

Q. And they were for the purpose of allowing Dr. Rotar to make a diagnosis and treatment of Miss Murphy, is that true?

A. Well, Dr. Rotar usually takes the interpretation of my associate and myself as experts in the field for his purposes.

Q. Now, in referring to the exhibits that show the skull, and [324] they show a normal skull, a concussion of the brain wouldn't show up on the X-ray, would it, Doctor?

A. If there weren't any——

Q. I mean if there wasn't any break, it wouldn't necessarily show up?

A. A concussion is a thing that would not be seen by X-ray. That's soft tissue or brain damage.

Q. Now, assuming, Doctor, that Mildred Murphy, having a cervical spine, as indicated by your X-rays, with, I think your report says minimal arthritic change between the fifth and sixth, isn't that correct, that it shows minimal according to the picture? A. I don't think I said that.

Q. I thought your report said that. Well, anyway, that it shows an arthritic change between those two vertebrae, and assuming that with that condition Mildred Murphy walked into the Safeway Store on Granite Street, and her feet suddenly shot out from under her, and she fell violently, and assuming that the striking of her head on the floor could be heard at some distance and that a very

(Testimony of Dr. James G. Sawyer.)

large swelling developed on the back of her head, and assuming that she had never had any feeling of any pain in the area between these two vertebrae, and that immediately after the fall, she began to feel the pain, which has continued to date, and as a result of the pain and discomfort, she is constantly forcing her head back, [325] as I am demonstrating now, have you an opinion as to whether or not such a fall might serve to aggravate that arthritic situation?

Mr. Poore: To which the defendant objects upon the ground and for the reason that it is improper cross-examination, and secondly, that there is no pleading whatsoever of aggravation of pre-existing injury.

The Court: Do you propose to amend to allege—I don't know, I think that you probably should plead aggravation.

Mr. Erickson: That may be, your Honor, I didn't anticipate that situation would arise. Of course, whether I would amend or not would depend somewhat upon the answer of the doctor. I believe my pleadings are sufficient, your Honor, because they are in general terms. In Paragraph 2, "bruising and injuring plaintiff's head, twisting and wrenching plaintiff's neck, wrenching and injuring plaintiff's cervical and lumbosacral spine, that as a result of such injuries——" and so on. It would seem to me that the pleadings are sufficient to encompass aggravation.

(Testimony of Dr. James G. Sawyer.)

The Court: I'll overrule the objection. You may proceed.

A. Now, would you mind repeating that, please, I just——

Q. Maybe Mr. Parker would read it and we wouldn't encumber the record.

(Question read back by Reporter.)

Q. May I add one more assumption, and assuming that in the [326] fall, she landed flat on her back?

A. Well, I can only judge that from my standpoint by the fact that there are two sets of films that I seen here, one dated in June of 1958, and one dated in, I think it was April, 1959, is that right?

Q. Yes.

A. That is of the cervical spine.

Q. Yes, the cervical, neck.

A. And I can say from that standpoint, that is a matter of six, at least nine months—here is one—there is one in June. Do you have one in—here is Exhibit No. 19, which was taken in June of 1958, and Exhibit No. 6, which was taken in April, 1959, which is a matter of approximately nine months, I would expect this patient, if this were an aggravation of her arthritis, if she received an aggravation of her arthritis, would demonstrate some progression of the spurring process along the margins of the vertebral bodies, and comparing them, vertebra to vertebra and interspace to interspace, and so on,

(Testimony of Dr. James G. Sawyer.)

I don't see any difference. Now, I would expect in a matter of nine months, I would expect some visible change to take place by X-ray. Another thing that gives me a sign that this patient's disease process is not activated or aggravated is the fact that she has in this study, in both studies, in fact, in Exhibits 6 and 19, a perfectly normal curvature of the cerivcal spine. If you run down along the posterior margins [327] or the posterior aspects of the margins of the cervical spine, this is practically an unbroken curve, which is within the limits of normal as far as any curvature. Now, with an actuely painful cervical spine, one of the first signs of injury to the cervical spine would be to see a straightening of a portion of the cervical spine, and not a straight nice curve all the way down. In other words, it might be curved down to here (indicating), and then all of a sudden, you would have a straightening of the cervical spine. That is a sign of spasm of the cervical muscles, and it indicates injury and it indicates pain in the cervical spine.

Q. To me, Doctor, it looks like that situation is exactly what exists. Do I misunderstand what that shows? It seems to me the last three vertebrae there have straightened, and that there is an abrupt demarcation as between the curve and the straight. Don't I see that right?

A. Nothing that would be out of the ordinary, in my opinion. In my opinion, the curvature is within the limits of normal.

(Testimony of Dr. James G. Sawyer.)

Q. Now, with that——

The Court: May I ask a question? Doctor, are you saying that from those pictures that if there is none, there is no spasm condition of the muscles or nerves in the cervical area of Miss Murphy, or are you just saying that these pictures don't demonstrate that there is spasm or tightening of the muscle? [328]

A. All I can say is that the films don't demonstrate it.

The Court: The films don't demonstrate it. Could there be without it being demonstrated on the film?

A. Yes, it is possible.

Q. (By Mr. Erickson): Now, Doctor, while you are there, you indicated when you were talking about the dorsal spine that the fact that the arthritis was diffused indicated to you that it was probably degenerative. Now, if there is some injury, whether it be as you indicated, an arthritis, or as Dr. Clemmons indicated, some sort of a compression fracture, if there is such a showing as you indicated and it is localized between just two vertebrae, does that have any significance to you at all?

A. If it were excessively different than the remainder of the spine, yes.

Q. What about the vertebrae that are next to it in the cervical spine, they don't show arthritis, do they?

A. What do you mean, next to the——

Q. Next to the fifth and sixth.

A. Yes, there is some here at the seventh, there

(Testimony of Dr. James G. Sawyer.)

is a little lipping and spurring and sharpening of the margin of the fourth here, there is a little bit in the posterior margins of these vertebral bodies to show the same process.

Q. Well, now, here's your report, Exhibit 29, is there any reason why you didn't make reference to that? [329]

A. I am sorry, sir, that's not my report.

Q. Well, Dr. Hammer, who also has the same qualifications as you, says in Exhibit 29, "Film studies of the cervical and dorsal spine demonstrate a slight narrowing of the joint space between C5 and C6, with minimal arthritic lipping," and that's the only reference to it. Since this is your record and it is presented by you, do you have any comment to make on it at all?

A. With respect to what, sir?

Q. Well, why there is no reference in his report to arthritis, since he pointed it out as to 5 and 6? Is it so small on these pictures that you think he overlooked it for that reason?

A. Well, I can't answer that, I don't know why.

Q. Will you put your picture of the cervical spine on again, Doctor, and see whether or not, looking at it, if that shows anything different on the arthritis? Oh, this is your picture, yes.

A. Yes, sir, that's Exhibit 19.

Q. Now, you may take the stand again, if you will, Doctor. In your view, there isn't a retrogression or progression or anything else so far as the cervical spine is concerned. Now, if that is the arthritis

(Testimony of Dr. James G. Sawyer.)

of old age, could you say whether you would expect in a period of nine months to see some progression, some change? [330]

A. Nine months is not a very long time to see changes of this type in the so-called old age or degenerative arthritis.

Q. Now, aside from the arthritis, if the space is narrowed between the vertebrae over what's normal, would you expect a violent fall might result in pain in that area greater than what it would be if you had a normal intervertebral space?

Mr. Poore: To which the defendant renews the objection on the basis there is no pleading of aggravation.

The Court: Overruled.

A. May I have the question again, please?

(Question read back by Reporter.)

A. Not necessarily so.

Q. Might it be true?

A. It might or might not.

Q. And you have no explanation, I take it, why Mildred Murphy, if the record shows that she suffered the fall described and that she immediately got violent pain in her neck for which she went to Dr. Rotar for treatment and still goes to him, do you have any explanation from the X-rays or otherwise, why she would now have that pain when she did not prior to the accident, if that's what the record shows?

(Testimony of Dr. James G. Sawyer.)

A. I have no explanation from the standpoint of the X-rays, no, sir.

Q. And would that be true also if the record shows she now suffers pain in the lower lumbar, and if the record shows she [331] suffered the fall described, would you have any explanation of why she had that pain and why it persists?

A. I have no explanation from the studies I have seen of that part of her spine.

Q. And that is your field, radiology?

A. I beg your pardon?

Q. Your field is radiology? A. Yes, sir.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Poore:

Q. Doctor, is there any X-rays in your files at St. James Hospital pertinent to Miss Murphy that haven't been produced here under the subpoena served on you?

A. As far as I know, these are all the films I have record of.

Mr. Poore: May this witness be permanently excused, your Honor.

Mr. Erickson: He may as far as the plaintiff is concerned.

The Court: Very well, thank you, Doctor, you may be excused.

(Witness excused.)

The Court: Well, does that end the day's session?

Mr. Poore: Well, I have another witness here that——

The Court: Well, we have been going since 1:30 this afternoon, [332] it's been a pretty long session. How many more witnesses do you expect to have, counsel?

Mr. Poore: We have three lay witnesses: we have Fred Stromseth; we have Leo Rodoni, who cleaned the floor; and we have Mrs. Ledingham, who took her to the hospital; and the expert, Dr. Davidson, if we call him.

The Court: Dr. Davidson and——

Mr. Poore: And Dr. Hammer, who prepared this report.

The Court: Well, we have a pretty full schedule for tomorrow.

Mr. Erickson: May it please the Court, in view of the testimony of Dr. Sawyer, and the importance that attaches to these X-rays, I should like permission to withdraw all of the X-ray pictures for the night, on my assurance, of course, they will be in court at the time we convene, and—of course, they cannot be tampered with, but in exactly the same condition they are now, for the purpose of having them examined by Dr. Clemmons.

The Court: Do you have any objection, counsel?

Mr. Poore: Well——

The Court: Can't the doctor examine them here?

Mr. Erickson: I don't know there will be time. I may not be in a position where Dr. Clemmons will

be available. I obviously don't understand X-rays.

The Court: Of course, you don't know whether he will do it tonight, either. [333]

Mr. Erickson: Well, I am hopeful.

Mr. Poore: Could we adjust the schedule in the morning to permit the same thing, whatever is convenient for the Court?

The Court: I would prefer not to send the exhibits out, and if they were to be otherwise examined outside of the custody of the clerk, I think it would have to be done in the presence of counsel for both sides, and that might be more inconvenient for everybody. In any event, Judge, I suggest you get hold of the doctor, and then talk to me, and we can see what we can do about it.

Mr. Erickson: Thank you, your Honor. As you know, I was unable to reach him at the recess.

The Court: I know you were unable to reach him at the recess. Well, you have a few minutes to try it now. How about the jury? There is at least three hours' more work, isn't there, if we have two more doctors testifying and three other witnesses. The three other witness' testimony will be short.

Mr. Erickson: We will have some rebuttal, and if Dr. Clemmons is available, the rebuttal will be rather extended.

The Court: Well, I guess maybe so, so we will figure on working most of tomorrow anyway, so there is no use starting at 8:30 or 9:00 in the morning, because we will have to work in the afternoon, anyway. I don't think we can finish the evidence tomorrow morning without starting early.

Mr. Erickson: I have no objection to starting early, as [334] far as that is concerned.

The Court: Would you rather start an hour early in the morning, say at 9:00 o'clock, and finish maybe an hour earlier in the afternoon? Would that help you any? Would you rather start at 9:00 o'clock? Let's do that. Then, you are excused until 9:00 o'clock in the morning, and Court will stand in recess until that time. (Jury admonished.) Court will stand in recess until 9:00 o'clock in the morning.

(Whereupon, a recess was had until 9:00 o'clock a.m., the following morning, April 18, 1959, at which time the following proceedings were had:)

The Court: You may proceed.

DR. LOREN G. HAMMER

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. Would you please state your name to the Court and jury, Dr. Hammer?

A. Loren G. Hammer, M.D.

Q. What is your residence, sir?

A. 3009 Atherton Lane in Butte.

Q. Are you married? A. Yes. [335]

Q. Do you have a family?

A. Yes, one child.

(Testimony of Dr. Loren G. Hammer.)

Q. What is your business or occupation, sir?

A. I am a radiologist.

Q. Where did you receive your medical training, Doctor?

A. In Providence Hospital in Detroit, Michigan, through Wayne University.

Q. What degree, if any, did you receive in medicine from Wayne University?

A. I received my Medical Degree from the University of Colorado, and my specialty training at Wayne University through Providence Hospital.

Q. Now, your medical training at the University of Colorado consisted of how many years training, Doctor?

A. Four years for the medical degree.

Q. Was that after completion of your college training? A. Yes.

Q. And after obtaining your medical degree, you then specialized? A. Yes.

Q. And radiology is your specialty?

A. Yes.

Q. How would you define that specialty, Doctor?

A. It is a special branch of medicine devoted primarily to the use of X-rays, radium, and radioactive isotopes in the [336] diagnosis and treatment of disease.

Q. After you obtained your medical degree from the University of Colorado, you then said you took further training in your specialty of radiology?

A. Yes.

Q. Would you again state what that was? Where

(Testimony of Dr. Loren G. Hammer.)

did you take that training and for how long a period of time?

A. The usual training for the specialty of radiology consists of three years. I took my residency in radiology in Providence Hospital in Detroit, which is affiliated with Wayne University.

Q. Now, the specialty itself was an additional three years? A. Yes.

Q. And does that include the residency?

A. That is the residency.

Q. Now, Doctor, what was your medical experience prior to coming to Butte?

A. I was Chief of Radiology at the Veterans Administration Hospital in Salt Lake City, and Associate Clinical Professor of Radiology with the University of Utah. That was for two years, and I was Associate Radiologist at Hurley Hospital in Flint, Michigan, for a year, and I have been associated with Dr. Sawyer in Butte at Butte Community Memorial and St. James Hospitals for the past year.

Q. Now, Doctor, do you recall on or about June 24, 1958, studying certain X-ray photographs of Miss Mildred Murphy, X-ray [337] plates of Miss Mildred Murphy?

A. Only that it has been recalled to my attention recently.

Mr. Erickson: May I ask one more question?

Mr. Poore: Certainly.

Mr. Erickson: At whose request did you study those plates?

(Testimony of Dr. Loren G. Hammer.)

A. At the request of Dr. Rotar.

Q. (By Mr. Poore): Dr. Hammer, I hand you Defendant's Exhibit No. 29, and ask you if you know what that is?

A. This is the original copy of the X-ray report made by me from the films at St. James Hospital, and is maintained in our hospital as the permanent record of the films.

Q. Now, I notice, Doctor, that there are several apparent entries here on this card, and that they carry the signature of some individual. Could you tell me whose signature that is?

A. Each of the entries, one on 6-24-58, 6-27-58, 9-26-58, are the entries, and they are all signed by me, Loren G. Hammer, M.D.

Q. Now, Doctor, using this Defendant's Exhibit No. 29, and making such use as you see fit of the X-rays in evidence, would you be able to take this report sentence by sentence and read it and explain it to the Court and to the jury? If you would like to step down here if you need this in your explanation. It appears here, Doctor, that the name of the [338] person involved is Miss Mildred Murphy, is that correct? A. That is correct.

Q. And would that be the patient?

A. Yes.

Q. Age 49? A. Yes.

Q. 625 North Montana Street, and then there is "Private" under there, what does that mean?

A. That is to distinguish the patients under a

(Testimony of Dr. Loren G. Hammer.)

private doctor, to distinguish them from contract patients under the A.C.M. contract.

Q. Then there appears "Dr.," which I presume is doctor, then "Leo Rotar"? A. Yes.

Q. And what relationship does he have to this matter?

A. He is the physician taking care of the patient under a private contract.

Q. The attending and treating physician?

A. Yes.

Q. And then "No. 02510," does that have any significance?

A. That is the number assigned to the films, and each film is marked with that number, as a distinguishing number for her case, to distinguish it from other cases of the same day.

Q. Now, Doctor, would you mind taking each sentence and reading it and explaining what the significance of the report is to [339] the jury?

A. May I use the films?

Q. If you believe that would clarify your explanation, I wish you would do so.

A. These are the skull films—there is one missing. These are films of the skull of this patient made on 6-24-58.

Q. You have placed in the shadowbox, Doctor, Defendant's Exhibit No. 21?

A. No. 21, and this is one of the four routine films that we take on a skull. This is the side to side view with the left side down. This is a view—No. 23 is a view of the skull made from front to back

(Testimony of Dr. Loren G. Hammer.)

showing the most posterior portion of the skull; No. 25 is the view made from the back to the front, with the face closest to the film.

Q. What were the dates of these, Doctor?

A. These were made on 6-24-58. This was made on 9-26-58.

Q. By "this," you are referring to Defendant's Exhibit No. 25?

A. And No. 23 was made on 9-26-58; No. 21, on 9-26-58, and my report at that time read, "A routine series of film studies of the skull fail to demonstrate any evidence of bone injury or disease. The vault is normal." This is the cranium vault in which is the bone structure surrounding the brain. "The vascular patterns are prominent but symmetrical." These are the vessels of the brain as we see them outlined inside the [340] cranial vault. "The sphenoid and petrous ridges and the clinoid processes are normal." These ridges in the skull itself are outlines of the inner table of the skull, and we routinely observe them to see if there is any erosion or any fracture, dislocation or disease process. "No injury to the facial bones or to the mandible can be seen." These are the bones of the face, the nasal bones, the orbits of the eye, the alveolar ridge, the mandible with the cheek, and no injury was seen. The impression, negative skull.

Q. Now, then, Doctor, was any other portion of the body examined and upon which you made a report in Defendant's Exhibit, what is it, 29?

A. No. 29. These are Exhibits No. 19 and——

(Testimony of Dr. Loren G. Hammer.)

Q. And 14, Doctor.

A. And 14. They were taken on 6-27-58. These are films of the cervical spine, the upper portion of the spine which extends from the base of the skull to the thorax or chest. They are the routine two standard views, one front to back, and one side to side. The report, "Film studies of the cervical and dorsal spine"—and this includes the dorsal, which I will show—"demonstrate a slight narrowing of the joint space between C-5 and C-6 with minimal arthritic lipping. The cervical vertebral bodies and their joint spaces are otherwise normal with no evidence of recent bone injury."

Q. Could you explain that, Doctor, from the X-rays? [341]

A. The 1, 2, 3, 4, 5—from the film there is a slight narrowing of the joint space between the fifth and sixth cervical vertebral bodies, with the small spurs arising anteriorly and posteriorly, front and back, as evidence of arthritic changes. They are best seen on this examination (indicating) because the other processes tend to obscure the arthritic changes on this examination (indicating). If you will look closely, you will be able to see two tiny spurs in this area, C-5 and C-6 (indicating).

Q. Doctor, is this narrowing an abnormality?

A. Yes, the joint space is normally this width (indicating), and this joint space (indicating) shows some narrowing.

Q. And what would you say was the cause of the narrowing of the joint space?

(Testimony of Dr. Loren G. Hammer.)

A. With the slight irregularity of the vertebral bodies and the arthritic changes, I believe these would indicate some degenerative arthritic changes with the resulting arthritic spurs.

Q. Go ahead, Doctor. No other abnormalities noted there, as you have indicated, no evidence of old or recent fractures?

A. There is no evidence of recent or old bone injury.

Q. And the date of those particular exhibits, Doctor?

A. This examination was on 6-27-58.

Q. For both of the X-rays which you have been interpreting, is that correct, Doctor? [342]

A. Yes, this one (indicating) is marked 6-24-58, but that is an error, a stenographic error.

Mr. Erickson: Which one is that?

Mr. Poore: Defendant's Exhibit No. 19.

Q. Doctor, did you make an examination on the 24th, June 24, 1958?

A. Yes, that was the skull examination. No cervical spine was examined. This is the examination of the dorsal spine on 6-27-58, made at the same time, and the same report made as the cervical spine. This is the film of the spine from front to back (indicating). It includes the bony thorax and the dorsal spine. The film studies of the dorsal spine demonstrate a minimal scoliosis with the convexity to the right as well as minimal arthritic lipping, but no evidence of recent bone injury or disease.

(Testimony of Dr. Loren G. Hammer.)

Q. Doctor, you are interpreting Defendant's Exhibit No. 20?

A. No. 20. This (indicating) is the minimal scoliosis or curvature of the spine. The spine instead of being perfectly straight turns a little to the right in this mid-part of the dorsal spine area. This (indicating) is the side to side view.

Q. Defendant's Exhibit No. 13?

A. Yes, showing the thoracic spine or the dorsal spine, and it also shows the minimal small arthritic spurs. There is no evidence of bone injury or fracture. [343]

Q. Is that minimal arthritic lipping or change consistent throughout the cervical and dorsal spines?

A. The upper cervical spine was comparatively free. The lower cervical spine had arthritic changes, and the entire dorsal spine, except maybe T-12, is involved with minimal arthritic changes. The next examinations were made on 9-26-58.

Q. Doctor, may I ask you there if that arthritic change, in your opinion, is of traumatic origin, or what type origin would that be?

A. It does not have the X-ray appearance of traumatic disease, it has more the appearance of degenerative arthritic changes.

Q. By trauma, we refer, use the word the same as injury?

A. The same as injury. The films—on 9-26, films of the skull, cervical and dorsal spines were made.

Mr. Erickson: May it please the Court, so far

(Testimony of Dr. Loren G. Hammer.)

as the skull is concerned, we have introduced no evidence indicating there was any fracture or bone injury to the skull, and we are willing to agree to that in the interests of speeding the matter up.

The Court: Yes; I think you might proceed to the controverted matters.

Mr. Poore: Very well.

A. These are the films of the cervical spine, the upper [344] spine, made on 9-26 (indicating). They are Exhibits Nos. 26 and 29. The report reads: "Film studies of the cervical spine fail to demonstrate any evidence of recent or old bone injury or disease, other than minimal arthritic changes." In the comparison examination, we find again 1, 2, 3, 4, 5, some narrowing of the joint space between the fifth and sixth (indicating), with arthritic spurs as previously seen.

Q. Is there any decrease in that joint space, in your opinion, between those two dates of June and September, 1958?

A. This is the examination, Exhibit 19, on 6-27, and this is the narrowed joint space between C-5 and C-6 (indicating), and this is the narrowed joint space on 9-26 (indicating), and I see no real change in the appearance of the joint space, no evidence of increase, or evidence of change in the spine. The other examinations at the time were the repeat film studies of the dorsal spine. This is the front to back view, Exhibit 27 (indicating).

Mr. Erickson: As to the dorsal, I think the situation is the same as with regard to the skull. We

(Testimony of Dr. Loren G. Hammer.)

are not contending that the dorsal spine was injured, it is only the lumbar and cervical, and we are willing to agree what the doctor's testimony would be.

Q. Does that complete your explanation to the Court and jury?

A. The impression for the examination was, "Negative cervical [345] and dorsal spines with the exception of minimal arthritic changes with no change in the appearance of the spines since 6-27-58.

Q. Now, Doctor, I hand you Plaintiff's Exhibit No. 1, which has been identified as an X-ray of the cervical spine of Miss Murphy taken on November 14, 1958, and I also hand you the Plaintiff's Exhibit No. 6, which has been admitted in evidence and has been identified as having been taken of Miss Murphy on April 7, 1959, which is also an X-ray of the cervical spine, and ask you if you would study that and compare any changes there, any abnormal conditions there, with the X-rays which you took and interpreted in June and September, 1958?

A. This is Exhibit No. 26, the film of the cervical spine on 9-26-58 (indicating); this is Exhibit No. 19, the film of the cervical spine made on 6-24, according to the date (indicating). As we showed before, the narrowed cervical space, the disc space between C-5 and C-6, with no change in appearance between these two. On Exhibit No. 6, the cervical spine made on 4-7-59, we see a narrowed joint space between C-5 and C-6, with the arthritic

(Testimony of Dr. Loren G. Hammer.)

changes anteriorly and posteriorly. On Exhibit 1, on 11-14-58, a narrowed joint space between C-5 and C-6, with arthritic changes anteriorly and posteriorly. Comparing the two and those made at the St. James Hospital, the only difference I can see is the difference [346] in technique, and the vertebral bodies positively visualized. Only part of C-7 can be seen on Exhibit No. 1, but the two vertebral bodies in question can be seen quite well, and I see no evidence of progression of the narrowing or of the arthritic spurring.

Mr. Poore: Thank you, Doctor, you may take the stand. You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Dr. Hammer, the report you read from is the report you gave to Dr. Rotar, is that correct?

A. Yes, sir.

Q. And you worked with Dr. Sawyer?

A. Yes, sir.

Q. But that is not his report; it is your report?

A. That is my report.

Q. Now, as I understand it, the radiologist works as sort of a teammate with the general practitioner or practitioner in other fields, isn't that correct? A. Yes.

Q. And it is your job to study these shadows that appear on these X-rays, and that has been your specialty, to interpret those to the general

(Testimony of Dr. Loren G. Hammer.)

practitioner, is that correct? A. Yes. [347]

Q. And you would assume when you gave your report to Dr. Rotar that it was going to be used in the treatment of Mildred Murphy, is that correct? A. Yes.

Q. Now, is it sometimes difficult, Doctor, to distinguish, particularly in a case like this where you say the arthritic change is minimal in the cervical, is it sometimes difficult to distinguish by mere examination of the X-rays where the change is minimal whether the change is traumatic or arthritic?

A. In the early traumatic cases, no; in those traumatic cases that have been of long standing, sometimes it can be difficult.

Q. And, as a matter of fact, the reason you have a specialty of radiology is because even examining something that is so much physical as a shadowgram or an X-ray, opinion is a determining factor, isn't it? A. Yes.

Q. And that is the reason why you have radiologists and orthopedic surgeons and the like?

A. Yes, sir.

Q. So it is quite common, is it not, to have disagreement between equally trained men as to what an X-ray shows? A. Yes.

Q. Do you know Dr. Clemmons here in [348] Butte? A. I do.

Q. And do you recognize him as a qualified orthopedic surgeon? A. Yes.

Q. Now, the difference between—do you call a

(Testimony of Dr. Loren G. Hammer.)

single orthopedic surgeon an orthopod, is there such a word?

A. If you know him well. It is not accepted.

Q. Well, I want to get away from the word "surgeon." What is the distinction between an orthopedic doctor and a radiologist, so far as their fields are concerned?

A. A radiologist has no patients of his own unless they are referred to him for therapy, X-ray or radium therapy. Routinely we do not see 80 per cent of the cases that come in to the hospital for examination. They come in with the prescription from the doctor, the X-rays are taken according to a standard plan, they are modified according to conditions, and then we read the films. An orthopedic surgeon has patients of his own. He is primarily interested in the treatment of bone and joint diseases by definition.

Q. And I believe Dr. Clemmons said they are also interested in the ligaments and the muscles that attach to the bone?

A. Around the joints and the bones, yes, sir; anything having to do with the bones is within his realm of interest.

Q. From your work—you have worked with orthopedic surgeons, have you not? [349]

A. Yes.

Q. And with general practitioners and with specialists in various fields? A. Yes, sir.

Q. Would you say the reading of the X-rays is only one of the elements of diagnosis of injury or

(Testimony of Dr. Loren G. Hammer.)

disease in any given case? A. Yes.

Q. So the complete diagnosis requires the consideration of other factors beside the pictures that come from the X-rays, is that correct?

A. Yes.

Mr. Erickson: That is all.

Redirect Examination

By Mr. Poore:

Q. Doctor, in answer to one of Mr. Erickson's questions, you stated, I believe, that in early traumatic cases you are able to determine whether the origin was degenerative or otherwise. Would you explain what you meant by early traumatic cases?

A. Those cases that have involved an injury where there is a definite fracture shown.

Q. Now, in the event, as the evidence has shown here, Miss Murphy fell on or about June 24, 1958, and your X-rays were [350] taken of the skull on the 24th, the cervical spine on the 27th, and again in September of '58, would that be taking the X-rays early in the traumatic history of the case?

A. Yes.

Q. So would it follow, Doctor, that you would be able to determine whether the abnormality was of traumatic or of degenerative origin?

A. Yes.

Q. And what would you say it was, Doctor?

A. I believe it is a degenerative arthritis of the cervical vertebral interspaces and the vertebral bodies. I saw no evidence of a recent fracture.

Mr. Poore: No further questions.

Mr. Erickson: Nothing further.

Mr. Poore: May the doctor be permanently excused?

Mr. Erickson: He may as far as plaintiff is concerned.

The Court: Yes, Doctor, you may be excused; thank you.

(Witness excused.)

FRED STROMSETH

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. Would you state your name to the Court and jury, please? [351] A. Fred Stromseth.

Q. What is your business or occupation, Mr. Stromseth?

A. I am a food clerk for Safeway on Granite Street.

Q. Where do you live?

A. 733 South Alabama.

Q. Here in Butte? A. Yes.

Q. Are you married? A. No.

Q. Live with your folks? A. Yes.

Q. Now, how long have you been employed with Safeway? A. Two and a half years.

Q. And during that entire time at the store on East Granite Street? A. Yes, sir.

(Testimony of Fred Stromseth.)

Q. Do you recall on or about the 24th of June, 1958, an accident involving Miss Mildred Murphy, seated here in the courtroom? A. I do.

Q. Where were you working at that time, Mr. Stromseth? A. I was in the back room.

Q. By the back room, would you explain to the jury what that is in relation to the part that the customers traverse?

A. That is in back where we have the back stock behind the [352] butcher shop there.

Q. What was the first you knew about there having been any accident?

A. About five minutes later I come up there, and they were standing there.

Q. You didn't see the accident?

A. No, sir.

Q. You didn't hear her fall or anything like that? A. No.

Q. And apparently you came up, and will you describe the scene that you saw when you came up?

A. She was standing up, and Mr. Frazer and Rose Ledingham and Al Squires and Tommy Hart were there.

Q. And what did you do then?

A. I just come up there and then I left right away.

Q. Did you make any examination of the floor?

A. No; I didn't.

Q. Did you talk to Miss Murphy? A. No.

Q. Did you hear any conversation while you were there? A. No; I didn't.

(Testimony of Fred Stromseth.)

Q. Were you asked to feel the back of her head, the bump on her head? A. No, sir.

Q. As I understand it, then, you left the scene of the accident [353] at that time? A. Yes.

Q. What did you do then?

A. Went back to my work.

Q. Do you have any other knowledge about the accident other than what you have testified to?

A. No, sir.

Mr. Poore: You may cross-examine.

Mr. Erickson: No examination.

The Court: You may step down.

(Witness excused.)

MRS. ROSE LEDINGHAM

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name to the Court and jury, Mrs. Ledingham. A. Mrs. Rose Ledingham.

Q. Where do you live, Mrs. Ledingham?

A. 100 Minah Street.

Q. Are you a married woman? A. Yes.

Q. Family? A. Two children. [354]

Q. Were you formerly employed by the Safeway Store in Butte? A. Yes.

Q. Would that include the period of June, 1958?

A. Yes.

Q. You are presently a housewife?

(Testimony of Mrs. Rose Ledingham.)

A. Yes.

Q. Now, calling your attention to the month of June, 1958, what was your duties with Safeway Stores at that time? A. Checker.

Q. And by checker, what do you mean?

A. Checking groceries out.

Q. Now, did you receive any money from the customers? A. Yes.

Q. Is that what a checker is? A. Yes.

Q. That is the clerk who takes the payment, is that right? A. That's right.

Q. Where was your station, where do you carry out your duties? A. In the check stand.

Q. Where are the check stands in Safeway?

A. In front of the store.

Q. By the front of the store, what area of the store are you referring to? If the store is on Granite Street there—strike that question. Mrs. Ledingham, I hand you a series of [355] exhibits, and ask you if in any of these exhibits you would be able to demonstrate to the Court and the jury where the check stand is that you——

A. The check stand is——

Q. Well, you take a look through those various exhibits and maybe you will find one there that is of some assistance to you.

A. It is off over here (indicating).

Q. Let's try another one. How does that one look? A. That's it.

Q. Now, you are referring to Defendant's Exhibit No. 11, which apparently shows some check

(Testimony of Mrs. Rose Ledingham.)

stands. Would you mind stepping down to the jury and pointing out the check stands you have described and the particular one where you were on duty that day?

A. I was in this one here (indicating).

Mr. Erickson: Designating——

Mr. Poore: Designating the most easterly one, Mr. Erickson.

Q. Now, what was the first you knew about any unusual occurrence having happened?

A. Well, I heard a thump and looked up.

Q. And did you actually see Miss Murphy fall?

A. No.

Q. Am I correct in this, that at the time you heard the [356] thump, you looked up, and you were then at this most easterly check stand?

A. Yes.

Q. What were you doing there?

A. Well, at the time I was filling the cigarettes, loading the cigarette rack.

Q. There was no customer there right at that particular time? A. No; not at that time.

Q. And when you looked up, what did you see, Mrs. Ledingham?

A. She was lying on the floor.

Q. Describe how Miss Murphy was lying on the floor?

A. Well, her head was facing Granite Street, and her feet were towards Quartz.

Q. Would you describe what her position on the floor was? A. She was on her back.

(Testimony of Mrs. Rose Ledingham.)

Q. Now, again, Mrs. Ledingham, I hand you Defendant's Exhibits No. 12 and No. 10 and No. 9, and ask you if those show any portion of the floor where you saw Miss Murphy lying when you looked up?

A. Well, if this is the second aisle, it would be right about in there (indicating).

Q. Now, you are referring to Defendant's Exhibit No. 10, and by "right about there," you indicated a circled "1"?

A. Right about there, yes. [357]

Q. What portion of her body would have been about there?

A. Well, her head would have been about there. This picture was taken after.

Q. You think her head was about where you are pointing here? May I put a "2" and put a circle around that? A. Yes.

Q. Have I placed the circled "2" on Defendant's Exhibit No. 10 at approximately where you think her head was? A. Yes.

Q. And then her body was facing generally in what direction? A. Here, north.

Q. Would you mind putting an arrow yourself in the direction her body was facing? Or stretched out, rather.

(Witness does as requested.)

Q. So that the tip of the arrow would be pointing towards her feet, is that correct, Mrs. Ledingham? A. Yes.

Q. Now, when you first saw Miss Murphy, then,

(Testimony of Mrs. Rose Ledingham.)

as I gather, she was on her back lying on the floor with her feet stretched out, is that correct?

A. That's right.

Q. What did you do, Mrs. Ledingham?

A. Well, I called over the speaker for Walt immediately and then I went right over.

Q. Who is Walt? [358] A. Mr. Frazer.

Q. And will you make every effort to speak up so we can all hear you? And then what did you do?

A. Well, I went over to her.

Q. And what did you do then?

A. Well, I am not too sure.

Q. Well, what do you believe you did?

A. Well, I imagine I tried to help her up.

Q. And would you tell the jury and the Court what occurred after that as you were helping her up and the events that thereafter occurred?

A. Well, Mr. Frazer came up and Al Squires and Tommy Hart, and then I went back to the check stand for a few minutes, and then I went back over and talked to her, and then I went back to the check stand, and then Mr. Frazer came over and asked me if I would drive her down to the hospital.

Q. Did you ever have any conversation right there at the store with Miss Murphy?

A. Not to my knowledge.

Q. Did you feel her head?

A. Not at the store, no.

Q. And how long would you say that you were around the area where you helped her up?

(Testimony of Mrs. Rose Ledingham.)

A. I would say not over five minutes.

Q. Now, did you, in your assisting her, and moving back from [359] her to the check stand and back again, notice anything slippery about the floor? A. No.

Q. And in helping her up, did you slip or slide yourself? A. No.

Q. Or notice anybody else? A. No.

Q. Did you inspect the floor?

A. I looked at it, yes.

Q. Did you notice anything unusual about the floor? A. No.

Q. Any foreign substance? A. No.

Q. Any skid marks? A. No.

Q. And then Mr. Frazer, or Walt, as you refer to him, asked you to take her to the hospital, is that right? A. That's right.

Q. What occurred then?

A. Well, I drove her down to the hospital.

Q. Well, how did she get from where she was standing there with Mr. Frazer to your automobile?

A. She walked to the car.

Q. Did you walk with her? A. Yes. [360]

Q. Where was the car situated?

A. Right in front of the store.

Q. Describe what kind of a day it was weatherwise? A. It was a rainy day.

Q. Was it actually raining then?

A. It was a drizzle.

Q. Do you know how long it had been raining before that?

(Testimony of Mrs. Rose Ledingham.)

A. Oh, early morning, I would say.

Q. And you left from in front of the store and went where, Mrs. Ledingham?

A. St. James Hospital.

Q. On your way down, did you have any conversation with Miss Murphy? A. Yes.

Q. Will you tell what you said to her and what she said to you?

A. Well, we were talking about the weather, and she did mention that her feet were wet and that she could possibly have slipped, you know, because of the wet on the waxed floor, and I asked her if she felt all right, and she said her head bothered her, and I did feel the bump then.

Q. Is that on the way to the hospital?

A. On the way, yes, after we stopped.

Q. Now, you took her to what hospital?

A. St. James. [361]

Q. And what occurred there, Mrs. Ledingham?

A. Well, they took us into the examining room and Dr. Rotar came in, and they put her in a wheel chair and took her to the X-ray room, and I went along into the X-ray room, and I stayed there until after they had taken the X-rays.

Q. And then what occurred?

A. Well, then her brother came and he said he would take her home, so I left.

Q. How long would you say you were at the hospital, Mrs. Ledingham?

A. I would say about an hour and a half.

Q. And where did you go from there?

(Testimony of Mrs. Rose Ledingham.)

A. I went back to the store.

Q. And did Miss Murphy go with you back to the store? A. No.

Q. And did you see her thereafter that day?

A. Oh, probably as a customer some time later.

Q. But not on that day? A. No.

Q. You went back to work at the check stand?

A. That's right.

Q. Now, in your duties working there at the check stand, checking people in and out the rest of the day, did you deal with the customers that came into the store? A. Yes. [362]

Q. Do you know of any other person who experienced any difficulty on the floor? A. No.

Q. Or any accident? A. No.

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. Will you describe that thump that you heard?

A. Well, it was an out-of-the-way noise; it was like a thump; it was enough to attract your attention.

Q. Now, when Miss Murphy was there at the store—first, before that, have you an estimate of the length of time it was between the hearing of the thump and the time you got over to where Miss Murphy was?

A. Oh, it was just a few seconds, I would say.

(Testimony of Mrs. Rose Ledingham.)

Q. You paged Mr. Frazer and then you immediately went over, is that correct?

A. That's right.

Q. Could you see her lying on the floor from your check stand? A. Yes.

Q. Do you recall whether there were carts between her and you? [363]

A. I don't believe there was. I mean there were carts back farther toward the door, but there wasn't any out directly.

Q. The store is a little different now than it was in June, 1958, isn't that correct?

A. Yes; that's right.

Q. I believe the testimony is that at that time there was some sort of turnstile which doesn't show here in any of these pictures, but in 11, some sort——

A. It would be over here (indicating).

Q. It wouldn't be ahead of the carts?

A. Just a little bit to the east end of where the carts are.

Q. And that is no longer there? A. No.

Q. And you are indicating that from where you stood—I can see a scale up in the right-hand corner? A. Yes.

Q. And you were in the check stand, the one to the extreme left?

A. This one over here (indicating), yes.

Q. And that is the one in back of the sign that says, "St. John's Bread, 29 cents," is that correct?

A. I don't know what they have there now.

(Testimony of Mrs. Rose Ledingham.)

Q. I mean in the picture it shows that?

A. Yes.

Q. And you could see her from the rear of your check stand, [364] is that correct?

A. That's right.

Q. Were there any other customers in the store?

A. I would say so, a few.

Q. Do you remember whether there were or not?

A. Well, they had been straying in all morning, you know, quite a few.

Q. You have no recollection on that morning?

A. Oh, I mean I had quite a few customers through, yes.

Q. What about at the time of the fall?

A. Well, I would say there was some in the store.

Q. Do you know that there were?

A. Oh, I would be pretty certain of it.

Q. Did any of them come over to where Miss Murphy was? A. No.

Q. Now, when you got over to where Miss Murphy was, she was trying to get up by herself, or was she still just lying there?

A. She was still just lying there when I got there.

Q. Were you the first one to try to help her up?

A. Well, I think Al was there just about the same time.

Q. Squires, is that Al Squires?

A. Al Squires, yes.

Q. And who arrived next after Squires?

(Testimony of Mrs. Rose Ledingham.)

A. Well, Thomas Hart and then Mr. [365] Frazer.

Q. Mr. Frazer was the last to arrive on the scene? What about Mr. Stromseth?

A. They were all just about the same time.

Q. Now, did you see her move at all as she lay there on the floor?

A. Now, I couldn't swear to that either way, other than, you know, starting to get up.

Q. That was rather an unusual occurrence, wasn't it? A. What do you mean?

Q. To have some customer lying flat out on the floor? A. Yes; it is.

Q. But you still didn't notice that, whether she moved before you got there?

A. Well, I mean she wasn't unconscious, I knew that much.

Q. How did you know that?

A. Well, she must have moved, but I know that she was not knocked unconscious.

Q. Did she seem dazed when she got up?

A. Yes.

Q. How long did that seem to last?

A. Well, I would say she was slightly dazed when I took her down to the hospital.

Q. You know Margaret Rosa, do you not, Mildred Murphy's sister? A. Yes. [366]

Q. If Margaret Rosa said that you had a conversation with her in which you said that Mildred seemed very dazed, and you were worried for fear she was going to faint all the way down to the hos-

(Testimony of Mrs. Rose Ledingham.)

pital, do you think that that would be a correct statement? A. That is right, yes.

Q. But you say now that she talked about the weather? A. We did comment on it, yes.

Q. Did she? A. I would say yes, she did.

Q. And she was doing that in spite of the fact that she had just suffered a very severe fall, and you, yourself, felt the bump on her head, did you not? A. That's right.

Q. Would you describe it?

A. It was quite a large bump.

Q. You could hear her hit when she actually fell? A. That's right.

Q. But she spent the time going down to St. James during the time you were worried about her fainting commenting about the weather?

A. Well, that's why I was trying to keep talking to her.

Q. Did she talk about the wet shoes, or did you?

A. She mentioned it. I mentioned it, and she agreed, you know, we talked back and forth that it was so easy to slip. [367]

Q. And who mentioned it first?

A. Well, I probably did; I couldn't swear it.

Q. Now, there is a canopy over the sidewalk, is there not? A. Yes.

Q. In front of the Safeway Store on Granite Street? A. Yes.

Q. And that extends clear to the east edge of the building, the east corner? A. Yes.

Q. Since you have worked there quite awhile,

(Testimony of Mrs. Rose Ledingham.)

could you say whether or not the parking lot on the edges, and particularly up against that east wall is gravel rather than paved as it is over the rest of the parking lot? A. I believe it is paved.

Q. My observation of it, Mrs. Ledingham, is that at least now, the gravel has tended to work to the edges, and particularly around on that east wall, and that that gravel on top of the paving extends out some 10 feet or so. Now, if you have observed it, I would like to know. If you haven't why——

A. No; I haven't.

Q. And if a car were parked at the extreme corner of the building, the southeast corner, right up against the sidewalk, the distance that a person would travel in going from the car to the store would be rather short, would it not? [368]

A. Yes.

Mr. Poore: To which the defendant objects as outside the scope of the direct examination of this witness.

Mr. Erickson: She has testified to the wet shoes, your Honor.

The Court: Yes. Overruled.

Q. So that if the car in which Mildred Murphy arrived in the morning were parked at the corner, as indicated here (indicating), and she got out of the car on the right-hand side and walked around, she would be under the canopy, which would protect the sidewalk, just by walking the length of the car and around, isn't that correct?

(Testimony of Mrs. Rose Ledingham.)

A. Well, underneath the canopy it still gets wet around the edges.

Q. The door is only how far from the corner of the store? A. I would say about 10 feet.

Q. And can you say whether that morning on June 24, 1958, the sidewalk was wet?

A. I would say it was, yes.

Q. Now, why would you say it was?

A. Well, because walking to the car, right beside my car it was wet.

Q. And you recall that? A. Yes.

Q. Was it raining? [369]

A. Yes; it was; it was a drizzle; it wasn't a heavy rain.

Q. Did you have a parasol or umbrella with you going to work that morning? A. No.

Q. So it wasn't a heavy enough rain for you to carry an umbrella?

A. Well, no; I parked right in front of the store and I only had to jump out of the car and run into the store.

Q. Did you have a raincoat?

A. Well, I had a coat.

Q. Now, there are parking meters in front of the store? A. That's right.

Q. And that was your practice to leave your car——

A. For two hours in the morning I usually did.

Q. And did you leave—did you move the car later on?

A. When I took her to the nospital.

(Testimony of Mrs. Rose Ledingham.)

Q. Was it raining then? A. Yes.

Q. How hard? A. Just a drizzle.

Q. Now, when you got to the hospital—one more question. In discussing this matter with Mrs. Rosa, do you have any recollection of whether you told her about the conversation you were supposed to have had with Mildred Murphy in the car in which Mildred Murphy was supposed to have said her feet were [370] wet? A. Oh, I don't recall.

Q. Now, when you got to the hospital, did you go with Miss Murphy to Dr. Rotar's office?

A. They took us to an examining room.

Q. Did you see anybody there at the hospital before you went to the examining room, that is, any official of the hospital?

A. Just the nurse that took us—that we met there, and then Dr. Rotar came in.

Q. Then after Dr. Rotar saw Miss Murphy, you went with her to the X-ray room?

A. That's right.

Q. Did you at any time during that period in the hospital have any discussion with Miss Murphy about who was going to pay the hospital bill?

A. I mentioned not to worry about it, that they usually took care of it, I mean, you know, referring to the current bills.

Q. Safeway you mean? A. Yes.

Q. And did you know that from your own experience?

A. Well, it was always understood that way.

Q. So that if anyone fell or was injured in the

(Testimony of Mrs. Rose Ledingham.)

store, it was your understanding that the practice was for Safeway to [371] pay it?

A. They always did, that was always understood.

Q. Do you know whether they did in this instance? A. No.

Q. Did you go up to the business office during any of that time to make arrangements with the business office as to payment? A. No.

Q. Did your own feet get wet that day going to the car? A. They were damp.

Q. How would you distinguish between damp and wet?

A. Well, they weren't soaked, but the soles were wet.

Q. Did you observe that yourself?

A. Well, naturally, I wear light shoes.

Q. Did you go into the car from the store side, or did you have to go around?

A. I had to go around.

Mr. Erickson: That is all.

Mr. Poore: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: I think we had better take a recess at this time. (Jury admonished.) Court will stand in recess until 10:00 minutes after 10:00.

(Ten-minute recess.) [372]

LEO RODONI

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name to the Court and to the jury, Mr. Rodoni? A. Leo Rodoni.

Q. Speak up so we can all hear you.

A. Leo Rodoni.

Q. Where do you live, Mr. Rodoni?

A. 319½ North Alabama.

Q. Here in Butte, Montana? A. Yes, sir.

Q. How long have you lived here in Butte?

A. Oh, about 34 years.

Q. Married? A. Yes, sir.

Q. Do you have a family? A. Three boys.

Q. And what is your business or occupation?

A. Well, at the present time, janitor.

Q. Employed by whom?

A. By Safeway.

Q. How long have you worked for Safeway, Mr. Rodoni?

A. It will be three years this fall some [373] time.

Q. During that time have you had any duties pertinent to taking care of the floors?

A. Yes; that is my work.

Q. That is your work? A. Yes.

Q. Have you ever worked on the floor at the East Granite Street store here in Butte?

A. Yes, sir.

(Testimony of Leo Rodoni.)

Q. In the month of June, and prior to that time, 1958, had you worked there at the East Granite Street store? A. Yes.

Q. For how long had you been working on the floors there at the East Granite Street store as of June, 1958? A. Well, I think about——

Q. When did you first start working on the floor at the East Granite Street store?

A. When I first started working for Safeway.

Q. Almost three years ago?

A. Yes; that was my first place I work.

Q. Now, do you recall as of June, 1958, what your schedule of work there at the store was?

A. Well, my schedule of work starts from Monday. That is the first place I do.

Q. I can't hear you, Mr. Rodoni.

A. My schedule is that I clean the East Granite place Monday [374] night.

Q. Any other night of the week?

A. At that time on Thursday.

Q. Did you work on any other floors in the Safeway Stores other than at East Granite Street?

A. Yes; I used to have the West Park, East Park and Harrison Avenue at that time.

Q. Did you clean those on other nights of the week? A. Yes, sir.

Q. Now, as to this East Granite Street store, you cleaned it on Monday night and on Thursday nights? A. At that time.

Q. Now, what time of the day, what time did that cleaning start, when did you start the job?

(Testimony of Leo Rodoni.)

A. My job started cleaning up after the store is closed, after 6:00 o'clock.

Q. Is that after the store is actually locked?

A. Yes; more or less after 6:00 o'clock.

Q. Directing your attention now to June of 1958, will you tell the Court and jury how you cleaned that floor? A. How did I do my work?

Q. Well, from the time you come in until the time you leave, what do you do to the floor?

A. Well, if you want me to explain, from the time that I come into the store until the [375] finish——

Q. Right.

A. The first thing, I usually come in before 6:00 o'clock because I got to get my things ready in the back room and everything like that. Then when I got everything ready and the store is locked and everybody is gone, I start working on the front.

Q. Right. Now, when you start working in the front, what is the first thing you do, Mr. Rodoni?

A. The first thing is mop it.

Q. Now, will you describe to the Court and jury how you mop it?

A. Well, more or less everybody knows how you mop, but I got a mop, wet it, wet the floor down, and then I dry it up.

Q. Now, will you describe the equipment that you have, where do you get the water from to mop the floor?

A. Oh, I got a big can, about a 20-gallon can.

Q. Now, that can, is that on any kind of a cart

(Testimony of Leo Rodoni.)

of anything, how do you carry a 20-gallon can of water?

A. Well, it is on a cart that you push.

Q. And does this equipment have anything to squeeze out the mop?

A. Yes; they got a regular mop squeezer they call it.

Q. Well, you just tell the Court and jury—I know this may sound simple—just what you do with the mop and what you do to the floor? [376]

A. Well, first I dip the mop into the can, and then I put it on the mop squeezer, on account of, you know, there is a lot of water in a big mop like that, so I squeeze out part of the water, and then I start cleaning up the floor.

Q. And do you have—what's in the water, if anything, just plain water?

A. No; I got some soap.

Q. Soap and water? A. Soap and water.

Q. And then you mop the floor, and then what do you do to the floor? A. Then I dry it up.

Q. What do you dry it with, Mr. Rodoni?

A. The same mop, but I squeeze it real dry with the mop squeezer.

Q. Now, what portion of the floor are you talking about in the store with this mopping, cleaning it up? A. What part?

Q. Yes. A. All around.

Q. Where the customers go, the front part of the store?

A. I usually start in the back.

(Testimony of Leo Rodoni.)

Q. I see, but that part would be cleaned by the time you get through with the whole store that the customers walk in? A. Yes, sir. [377]

Q. Okay, then after you mop the floor, then what do you do?

A. After I got through mopping?

Q. Yes. A. Then I apply the wax.

Q. And will you describe how you apply this wax?

A. I got a sprinkler, one of these garden sprinklers.

Q. Did you bring that with you?

A. Yes, sir.

Q. Would you mind getting it and showing us how—did you bring that mop, too?

A. Yes, sir.

Q. Would you mind getting that, too? You have there what looks like a regular garden sprinkler can. What is that thing?

A. That's what it is.

Q. What do you use it for?

A. To apply the wax on it.

Q. All right, go ahead and unwrap the other package, and then you can resume your testimony.

(Witness does as requested.)

Q. You can just stay right there, Mr. Rodoni. Now, as I understand your testimony, after you have mopped the floor, then you wax it?

A. Yes, sir.

(Testimony of Leo Rodoni.)

Q. Now, at that time, is the floor still wet or dry, or what [378] is the fact?

A. Oh, the floor is dry, sir.

Q. Now, just what do you do in waxing this floor? Describe that.

A. The first thing I do is to damp this mop here with the wax.

Q. Now, where had you gotten the wax for your little can there, the sprinkler can?

A. Where I get the wax?

Q. Yes. A. From a five-gallon can.

Q. And where is that kept?

A. Back in the back room.

Q. Back in the janitor's quarters there?

A. Yes, sir.

Q. All right, now, you have the wax in the little can and you are ready to begin waxing the floor. Now, explain to the jury how you work it?

A. Well, I wet this mop here (indicating) first, because on account of from one mopping to the other, it gets dry and stiff——

Q. Right.

A. So, I wet this first so it will be nice and soft.

Q. And then what do you do, Mr. Rodoni?

A. Then I take the can, the sprinkler can, and I go around [379] the store and sprinkle it down.

Q. Show us just how you do, just do it. Assume this is an aisle down here, right down through here in front of the jury, how would you do that?

A. I would go pretty fast. (Demonstrating.)

(Testimony of Leo Rodoni.)

Q. Walk along at a regular pace, and apparently with sort of a circular motion?

A. Yes.

Q. Okay; would you go ahead, Mr. Rodoni? What—does that put wax on the floor?

A. Yes, sir.

Q. This is apparently liquid wax?

A. Liquid.

Q. Then what do you do, Mr. Rodoni?

A. Then, after I got through with that, my mop is nice and soft, and I smooth it out, and I just go right along with this one (indicating).

Q. Just show us the way you do that.

A. I just push it like this (demonstrating), light and even.

Q. It looks to me like you are pushing right straight ahead?

A. Right straight ahead, not much pressure.

Q. Not much pressure?

A. Just like this (demonstrating).

Q. Okay; mop her up on the way back. Now, I noticed you are [380] walking at an ordinary pace?

A. Yes, sir.

Q. Do you do any scrubbing around with the mop? A. No, sir.

Q. Just straight up and straight back?

A. Yes, sir.

Q. Now, how much wax do you put on that floor in this operation, and by that floor, I mean the entire floor area that the customers walk on?

A. Well, it is according, some time, to the con-

(Testimony of Leo Rodoni.)

dition of the floor, but more or less I could say around a quart or a little over a quart.

Q. Approximately a quart of liquid?

A. Yes.

Q. And that's gotten out of this big five-gallon can?

A. That's right; out of the five-gallon can.

Q. You may sit up in the chair there. Now, you do that over the whole floor, or what is the fact?

A. I do that all over the floor.

Q. And what time of the day or night is this done? A. It is done after 6:00 o'clock.

Q. What time would you ordinarily be through with this waxing operation, Mr. Rodoni?

A. Oh, I usually be through around 9:00 o'clock.

Q. Now, how long does it take that stuff to dry? [381] A. This wax here?

Q. Yes.

A. Well, if you really want to walk on it, you can walk on it after 30 minutes.

Q. How many minutes? A. 30 minutes.

Q. Now, how about if it sets for an hour or two?

A. Well, that's better yet.

Q. How about all night long until the next morning? A. That is still better.

Q. I don't suppose you remember the particular night you waxed this on June 23rd, Monday, June 23, 1958?

A. Well, I remember if it was a Monday night.

Q. Do you remember the particular operation, the particular job you went through that night?

(Testimony of Leo Rodoni.)

A. I always do the same work, the same operation.

Q. Do you buff it? A. No, sir.

Q. Any mechanical process, any machinery used in this thing at all? A. No, sir.

Q. Just what you have described?

A. Just what I got there.

Q. Just what you have showed us here?

A. Yes, sir. [382]

Mr. Poore: You may cross-examine.

Cross-Examination

By Mr. Erickson:

Q. When did you quit waxing the floor on Thursday nights at the West Granite Street store?

A. Oh, it might have been about three months ago.

Q. Now, can you say whether or not a waxed floor when wet is more slippery than when it is dry?

A. Well, it all depends. If you put the wax on when the floor is still wet, then it is pretty slippery.

Q. Now, I have in mind another question along the same line. But assume now that you waxed the floor and it is dried properly, if you spill water on it or have wet feet, can you say whether or not it would be more slippery from being wet than if no water was on it?

A. If the wax is really hard, water won't affect it because it takes quite awhile for water to dilute this kind of wax.

(Testimony of Leo Rodoni.)

Q. You would say so far as a person—if you spilled a bucket of water on the floor after it was waxed, and somebody stepped on that area, it would be no slipperier than where it was dry?

A. Not that I know of unless the water has been sitting there for quite some time.

Q. The water would tend to dilute the wax, is that correct? A. That's right, sir. [383]

Q. How fast does this wax you have dry?

A. Well, like I stated just a minute ago, you could walk on it in 30 minutes.

Q. You walk along with a sprinkling can, and you use a circular motion? A. Yes, sir.

Q. Does the wax you get on get on every portion of the floor by doing it that way so it is spread uniformly?

A. When I go through with the mop, yes, sir.

Q. No; to begin with, with the sprinkling can?

A. No; there is a little bit more one place than another when sprinkling with the can.

Q. Do you make any attempt to put more in the center of the aisles than the edges?

A. Yes.

Q. When going through with the sprinkling can?

A. Yes.

Q. What is the reason for that?

A. To stay away from the edges of the fixtures.

Q. Can you say whether or not the wax tends to wear out faster in the center of the aisles than it does on the edges? A. That's right, sir.

Q. You can observe that when you are cleaning?

(Testimony of Leo Rodoni.)

A. I see that it is wearing out where you walk on it.

Q. So you try to concentrate more of your wax in the more [384] worn spots, is that true, in putting it on?

A. Yes; I always stay away from the edges of the fixtures.

Q. How far away from the edges do you stay?

A. About three inches, three or four.

Q. Now, getting back to this question of the wax drying—maybe if I used the word setting up, so that it would be partly dry. Can you say how long it takes—if you didn't buff this at all, and you just left the wax as you poured it, do you know how long it would take for it to dry under those circumstances?

A. If I don't smooth it out with the mop?

Q. Yes.

A. Just leave it set the way I sprinkled it?

Q. Yes.

A. It would take a lot longer. It all depends on——

Q. How thick it is?

A. ——how thick it is.

Q. So if in going over it with the mop, you happened to miss a spot—I am not saying you do, but assume you did and it was just the way it came from the can, that spot would remain wet, it wouldn't dry as fast as though you smoothed it out, is that correct?

A. It would take a little longer to dry, yes, sir.

(Testimony of Leo Rodoni.)

Q. Now, have you ever done anything to remove old wax there at the Granite Street store other than just mop? [385]

A. Have I done anything to remove it?

Q. Yes. A. I did remove some wax lately.

Q. Did you do that before June 24, 1958?

A. No.

Q. The manager, Mr. Frazer, stated about two months before June 24, 1958, some extraordinary steps were taken to remove accumulated wax. Do you recall that incident at all?

A. Oh, more or less. You know, if I got some extra time, I go around and pick some up.

Q. How do you do that?

A. Well, I wet it first with the water, hot water, you know.

Q. More hotter than you use when you mop it regularly? A. Yes; really hot.

Q. Do you put any preparation in that hot water you use to dewax?

A. I used to use a little lye to dewax it.

Q. You don't use that as a regular thing, the lye? A. No.

Q. You do observe that the wax has a tendency to build up, is that correct?

A. Oh, absolutely, if you don't walk on it, if you don't wear it, it builds up in time.

Q. So if you put on more later, it will build up to more wax, and you will eventually have to remove some of it, is that [386] correct?

A. That's right.

(Testimony of Leo Rodoni.)

Q. And you did that in the Granite Street store some time within the last couple months?

A. Dewax?

Q. Yes; take some of this old wax off?

A. Yes; I did.

Q. I take it from your answers, you have done that before, this isn't the only time?

A. Like I say, if I had some extra time, I used to go and pick up some where it was the worst at that time, see.

Redirect Examination

By Mr. Poore:

Q. How many times do you wax the floor there at the West Granite Street store?

A. How many times do I wax it?

Q. Yes; per week.

A. Well, I wax it once a week, all the store, and then once I just wax the floor part where there is the check stand and where there is more traffic.

Q. Now, Mr. Erickson asked you about the building up of this wax. In what part of the floor does the excess wax build up?

A. Well, to explain better where it would build up the most is like underneath here [387] (indicating).

Q. In other words, not where people walk, but under the edge of the fixtures?

A. No; it never builds up as it would under there. It would sometimes build up a little bit where you would walk.

(Testimony of Leo Rodoni.)

Recross-Examination

By Mr. Erickson:

Q. You say there is a change in the method of waxing, that prior to a year ago you waxed the whole store twice a week, is that correct?

A. Two years ago.

Q. You waxed it Monday and Thursday nights, and now you don't wax it Thursdays, is that correct?

A. I don't work on Thursday any more.

Q. But before this change, you waxed the whole store twice a week? A. Yes.

Q. Before——

A. Sometimes I did, and sometimes I didn't. It is all according to the shape the floor was in.

Q. The night you don't wax it all, you said you wax the area by the check stand twice a week, out in front of the check stands, is that what you said?

A. At the present time.

Q. How big an area is that? I don't know whether any of [388] these pictures will show it. This picture is No. 11. A. Yes.

Q. This shows the back of the check stands, Mr. Rodoni. Now, here is the front of the store (indicating)? A. Yes, sir.

Q. You would wax the area out in front of the check stands, is that correct, on the other night?

A. By the main door.

(Testimony of Leo Rodoni.)

Q. What about in front of the fruit and vegetables?

A. That's right; I come down in here (indicating).

Q. Past the fruit and vegetable stand, is that correct? A. Yes.

Q. Do you go into the aisle where the fruit and vegetable stand is? A. Yes.

Q. Here is the beginning of the aisle going down toward the coffee and stuff (indicating). Now, on this other night besides Monday, how far down that aisle do you go?

A. I just go about half ways here (indicating).

Q. You are now designating you go about to where the marks "1" and "X" are on Exhibit 11, is that correct? You drew a line through "1" and "X"? A. Yes, but I don't go down.

Q. But you don't go down the aisle itself?

A. No. [389]

Q. Insofar as that area around the front of the store and where these marks are on Exhibit 9, you wax those twice a week, but the rest of the store you only wax once a week unless there is some unusual condition, is that correct?

A. That's right.

Mr. Erickson: That is all.

Mr. Poore: May Mr. Rodoni be permanently excused, your Honor?

Mr. Erickson: He may as far as the plaintiff is concerned.

The Court: You may be excused, Mr. Rodoni, you can go now.

(Witness excused.)

Mr. Erickson: I wonder, your Honor, since these items, particularly the sprinkling can, were so prominently displayed here, and reference directed to them in the description, if I might not be within my rights to suggest to counsel that the jury is entitled to have them as exhibits?

The Court: You can offer them, or counsel can offer them, take your choice.

Mr. Poore: I hate to take them away from him, interrupt his operations.

Mr. Erickson: I assume that Safeway might have quite a supply of them.

The Witness: Those belong to Safeway.

Mr. Poore: I guess we can volunteer the mop and can. We will offer them in evidence. [390]

The Court: They are admitted.

(Defendant's Exhibits 30 and 31 received in evidence.)

DR. JOHN G. DAVIDSON

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Poore:

Q. State your name to the Court and jury, please, Dr. Davidson. A. John G. Davidson.

Q. What is your business or occupation?

(Testimony of Dr. John G. Davidson.)

A. Orthopedic surgeon.

Q. And how long have you lived here in Butte?

A. Well, off and on for the past 30 years.

Q. Married? A. I am.

Q. Do you have a family?

A. Two children.

Q. Where did you receive your medical training, Doctor? A. University of Minnesota.

Q. And when did you get your degree in medicine?

Mr. Erickson: I am prepared to admit the doctor's qualifications as an orthopedic surgeon.

Mr. Poore: Thank you, but I prefer to let the jury hear [391] it.

A. I received my medical degree in 1942.

Q. And that was from what university, sir?

A. University of Minnesota.

Q. Thereafter what medical training did you have, Doctor?

A. I spent four years in the service doing all kinds of medical work. I then practiced as a general practitioner in Minneapolis for about one year, a general practitioner in Cadillac, Michigan, for about two and a half years, then I started my training in orthopedic surgery.

Q. Is orthopedic surgery a specialty, Doctor?

A. It is.

Q. How would you define orthopedic surgery?

A. Orthopedic surgery is that branch of medicine that has to do with the treatment of bones and joints.

(Testimony of Dr. John G. Davidson.)

Q. Am I correct in this, then, Doctor, after being a general practitioner for a number of years, you took further study in orthopedic surgery?

A. I did.

Q. Where did you take that study, Doctor?

A. Veterans' Hospital in Minneapolis, the Univity of Minnesota hospitals, the Shriners' Hospital for Crippled Children in St. Paul, and the Minnesota State Hospital for Crippled Children in St. Paul.

Q. What period of time was consumed in your studies there? [392]

A. That took approximately four years.

Q. And what, if any, additional degree did you obtain in medicine at the end of that time?

A. No further medical degree, just the right to apply to the American Academy of Orthopedics to become a fellow of the American Academy of Orthopedics.

Q. Did you so apply? A. I did.

Q. Did you become a member of the Academy?

A. I did.

Q. You are still a member in good standing?

A. I am.

Q. Do you belong to any medical societies or organizations, Doctor?

A. The American Medical Association, the American Academy of Orthopedics, the American Board of Orthopedics, the American College of Surgeons, the Western Orthopedic Association, and the local Montana and county organizations.

(Testimony of Dr. John G. Davidson.)

Q. Now, Doctor, is your practice limited to your specialty? A. It is.

Q. You are not a general practitioner?

A. No.

Q. Are patients referred to you by general practitioners? A. They are.

Q. Now, Doctor, at our request, did you examine Miss Mildred [393] Murphy, the plaintiff in this case? A. I did.

Q. Can you state when you examined Miss Murphy? A. May I use my notes?

Q. Yes, sir.

A. Miss Murphy was examined on March 4, 1959.

Q. Now, Doctor, did you make an examination of the cervical spine of Miss Murphy at that time?

A. I did.

Q. Now, Doctor—excuse me just a second, Doctor.

Mr. Poore: As to the pathology of the bones of the skull, there is no issue?

Mr. Erickson: No issue.

Mr. Poore: Would you like to go into the nerve and muscular areas of the head so far as the doctor's examination is concerned?

Mr. Erickson: I don't think so.

Q. Very well. Now, Doctor, as to the cervical spine, did you make an examination of Miss Murphy? A. I did.

Q. And would you describe how that examination was made, and what your findings were?

(Testimony of Dr. John G. Davidson.)

A. I had Miss Murphy sit in a chair, or on the examining table, I don't remember which, and had her move her neck, of which the cervical spine is the bony portion, I had her move [394] that in all directions to see if there was any loss of motion in the cervical spine.

Q. Did you notice any loss of motion, Doctor?

A. There was full range of motion in all directions.

Q. Go ahead with your report, Doctor?

A. The patient stated that the neck hurt when she did move her head and neck through the range of motion. I examined the muscles in the back of her neck and the front of her neck to see if there was any spasm or tightness, and found none.

Q. Now, Doctor, is there a difference between subjective and objective findings?

A. There is.

Q. What are subjective findings?

A. Subjective findings are those findings which the patient complains of, but the examiner does not necessarily see.

Q. Now, what is an objective finding?

A. An objective finding is the findings that the examiner is able to determine or see while he is making the examination.

Q. Now, Doctor, when you asked Miss Murphy to move her neck and she moved it through the full range of motion, you indicated that she complained of it in certain areas of the motion. Is that subjective or objective?

(Testimony of Dr. John G. Davidson.)

A. That would be a subjective finding.

Q. Thereafter, I believe you said you checked the patient, [395] Miss Murphy, as to any muscle tightness or muscle spasm, is that correct?

A. That is correct.

Q. Now, is that a subjective or an objective finding?

A. If spasm had been present, that would have been an objective finding.

Q. Was there any spasm present?

A. I found none.

Q. Did you find any objective symptoms corroborating the complaint of pain in the movement of the neck? A. I did not.

Q. Go ahead with your report, Doctor.

A. After examining the muscles in front of the neck and in back of the neck, I had the patient move her shoulders, elbows, wrists and hands to test for motion. These were all within the normal limits. I tested the upper extremities, or the arms, for strength, and the strength of the arms were within normal limits. I tested the arms for reflexes, and this was normal. I also tested the arms with a pin point to see if there was any change in sensation or feeling in the arms, and this was normal.

Q. Doctor, in the testing of these muscles and tissues of the upper shoulders, arms and neck, did you find any atrophy or withering of any tissues?

A. I did not. [396]

Q. Any abnormality whatsoever tending to weaken or incapacitate a person?

(Testimony of Dr. John G. Davidson.)

A. Nothing that I could find.

Q. Now, Doctor, did you also take an X-ray photograph of the cervical spine?

A. Yes. I did not take them myself. They were taken by my technician under my supervision.

Q. Do you have the X-rays with you, Doctor? Maybe we can mark them all at this time.

(Witness produces X-rays.)

Q. Doctor, I believe you stated that you took an X-ray photograph of the cervical spine, that is, the neck area, of Miss Murphy. I hand you Defendant's Exhibits No. 33, No. 34 and No. 32, and ask you if you can identify those exhibits?

A. Can I put them up there?

Q. Certainly.

A. X-ray, or Exhibit 32 is a radiograph of Miss Murphy's neck bones——

Q. Now, just a second. Now, this X-ray was taken under your supervision and control?

A. It was.

Mr. Erickson: I have no objection. I will make no objection to any of them, I don't think.

Mr. Poore: We offer in evidence Defendant's Exhibits Nos. 32, 33 and 34. [397]

The Court: They are admitted.

(Defendant's Exhibits 32, 33 and 34 admitted.)

Q. Now, Doctor, would you proceed with your explanation?

(Testimony of Dr. John G. Davidson.)

A. Exhibit 32 is a radiograph of Miss Murphy's bones of the neck taken with the X-ray on one side of the patient and the X-ray plate on the opposite side, a side to side view, which shows Miss Murphy's neck bones with her head tilted backward. And on this film we can see the complete cervical spine, the bones of the neck. There is an abnormality of the disc space between the fifth and sixth neck bones. This is more narrow (indicating) than the spaces above and below those two particular neck bones. There is also a very minimal amount of arthritic spurring noted in this same area. Otherwise, there is no evidence of any recent or old fractures or other bony pathology.

Q. Thank you, Doctor. Now, as to the other X-rays of the same area, is there anything shown in those areas indicating—in those X-rays indicating any abnormality?

A. Exhibit 33 is a radiograph of Miss Murphy's neck bones, taken with the X-ray in the front and the plate at the back of the neck, and it shows nothing of note. It is not a good X-ray for explanation in a case like this. Exhibit 34 is another side to side view of Miss Murphy's neck bones, and here again we see the same changes in the neck bones as we previously described. Also, on this film we see a little [398] change in the curve of the neck as the head is bent forward. No evidence of any recent breaks, fractures or dislocations can be seen.

Q. Thank you, Doctor. Did you also make an examination of the tissues, muscles, tendons and

(Testimony of Dr. John G. Davidson.)

bones of the lumbar spine and back area of Miss Murphy? A. I did.

Q. Now, confining your attention only to the—in the interests of time, Doctor, I won't ask you about the dorsal spine, other than if you noticed any arthritic changes in the dorsal spine?

A. There were arthritic changes noted on the X-ray, yes.

Q. Now, Doctor, did you also make an examination of the muscles, tissues, tendons and bony structure of the lumbar or lower spine of Miss Murphy?

A. I did.

Q. Would you describe the tests that you had Miss Murphy perform, and what your conclusions were from those tests, in other words, your examination, Doctor?

A. I had Miss Murphy stand up and pressed quite vigorously over all the vertebrae from the neck down to the tailbone, and she did complain of some tenderness over the first and fifth lumbar vertebrae, or the first vertebra in the low back and the last vertebra in the low back.

Q. Is that a subjective or an objective [399] finding? A. That is a subjective finding.

Q. Proceed, Doctor.

A. There was also slight tenderness when pressure was applied over the left buttock, and along the course of the left sciatic nerve, or along the back of the left leg. The patient again complained of some tenderness.

(Testimony of Dr. John G. Davidson.)

Q. Did you perform any tests as to the verification of those subjective findings, Doctor?

A. I did, I had the patient go through a range of motion with the lumbar spine and found that she was able to bend forward completely, but that she complained of some pain when she was at the very extreme of bending forward. I had her bend backwards as far as she could. She was able to do this within the normal limits, and again she complained of some pain in the area of the first lumbar vertebra. The patient then bent to the left side and the right side, and she was able to bend completely in both directions, but again she complained of pain on the extremes of this motion, or at the very end of the motion. I then had her walk on her heels and toes to see the strength of the muscles that make the heels and—or make the foot function. She was able to walk on her heels and toes, but complained of some pain in the low back area when doing this. I then squeezed her neck near the jugular vessels to see if any referred pain could be noted in the back or down the legs, and no pain was noted. I then [400] tapped her on top of the head to see if any referred pain was found in the low back or in the back. Again none was noted. I tapped her knees and ankles with a small rubber hammer to see how her reflexes were, and they were within normal limits. I then did a straight leg raising test, which is a test to check for irritation of the nerves or back irritation, and the test is carried out by having the patient lie on their back

(Testimony of Dr. John G. Davidson.)

flat with the legs straight out, and then the leg is grasped by the heel and raised up, and usually if there is irritation of the sciatic nerve or back pain, the patient will complain of pain in the back, or in the back of the leg as this leg is raised up. That patient had no pain whatever when the straight leg raising test was carried out. I then did a Lasaque's test, which is another test similar to the straight leg raising test, to check the straight leg raising test, and this was also within normal limits. A Patrick's test, or a test to check the hips, was then done. This test is done by putting the right heel on the left knee, and then bending the leg outward. The test was positive on the left and negative on the right. I then checked the patient's sensation in the lower extremities and found this to be within normal limits. I checked the strength of the muscles of the great toes, or the big toes, and this was also within normal limits. I did a Romberg test, or a test to show Miss Murphy's balance, as she had complained that she could not keep her [401] balance. This is a test where the patient puts her heels together and stands straight up and closes her eyes. If there is some difficulty with the part of the brain that keeps the patient in balance, after having their eyes closed a short time, they will start swaying, and oftentimes will fall over if they are not caught. Miss Murphy passed this test and did not sway or fall. I then had her stand on one leg with her eyes closed, and she was able to balance on one leg. I

(Testimony of Dr. John G. Davidson.)

had her stand on the opposite leg, and she was able to balance on that leg and had no difficulty.

Q. Now, Doctor, am I correct in this that in your initial examination of palpation or feeling, you said you pressed along Miss Murphy's lower spine with your fingers and you said you elicited subjective symptoms, is that right?

A. That is right.

Q. Now, you described the various tests you performed subsequent to that. Are those for the purpose of corroborating or raising a question as to the subjective findings? A. They are.

Q. Now, did you find any objective—were there any objective findings corroborating any pain along the sciatic nerve? A. There was none.

Q. Or in the limitation of motion, the pain that was complained of on forward and backward bending there, was there any objective corroboration of that? [402] A. None that I found.

Q. Now, Doctor, what is the sciatic nerve?

A. The sciatic nerve is a group of nerves that come from the lower portion of the back and go together or unite just at the buttocks, and then they travel down the back of the leg as one large nerve.

Q. Is that one of the largest nerves in the body?

A. It is the largest nerve in the body other than the spinal cord.

Q. Did you bring your little Junior along with you? A. Yes.

Q. Would that be of assistance to the jury in seeing where the sciatic nerve takes out?

(Testimony of Dr. John G. Davidson.)

A. This is a plaster model of the lumbar spine, or lower part of the spine and sacrum and tailbone. This rubbery thing in here (indicating) represents the spinal cord. These little rubbery things (indicating) represent the nerves as they come out from the spinal cord, come out the little holes alongside the vertebrae. As these little nerves come out alongside the vertebrae, as they get down to about here (indicating), they all go together, and form one large nerve, and then as they go down the buttocks and down the back of the leg, they remain as one large nerve until they get just behind the knee, just above the back of the knee, and then they start spreading out again. [403]

Q. Now, Doctor, these various tests you described like the Lasaque's test, the tapping the patient on the head, the straight leg test, etc., now what relationship, if any, do those tests have to the nerve system that you just described?

A. Well, when we do the straight leg raising test, that puts the sciatic nerve on the stretch, and if the nerve is irritated or pinched or pressed on by a ruptured disc, or by an arthritic spur when the nerve is stretched, they have pain. And also with the Lasaque's test, it is somewhat the same, and again they will complain of pain when this test is carried on.

Q. Am I correct in this, Doctor, that the various tests you have performed that you just described to the jury directed at the lumbar spine were negative tests? A. They were.

(Testimony of Dr. John G. Davidson.)

Q. You may resume the stand. Did you take X-rays of the lumbar spine, Doctor?

A. I had my technician take one.

Q. Are you able to identify it from this group of exhibits, Doctor? We might pull out the lumbar, not the lumbar, but the dorsal. If you would step to the shadowbox again, Doctor, and identify these. I hand you Defendant's Exhibit No. 39, and ask you if you know what that is?

A. This is Exhibit 39, it is a radiograph of Miss Murphy's low back and pelvis. [404]

Q. And, Doctor, was that taken under your supervision and control? A. It was.

Q. It truly and accurately portrays the condition it purports to portray? A. It does.

Mr. Poore: Offer in evidence Defendant's Exhibit No. 39.

Mr. Erickson: No objection.

The Court: It is admitted.

(Defendant's Exhibit 39 admitted in evidence.)

A. This picture of the bones of Miss Murphy's lower back and pelvis was taken with the X-ray tube in front of the patient and the plate at the back, a front to back picture. It shows the vertebrae of the lower spine, pelvis and hip joints.

Q. Describe any pathology, that is, any abnormality, as I understand the word, shown there, Doctor?

A. There is a little rotoscolosis—roto meaning

(Testimony of Dr. John G. Davidson.)

rotation, scolosis meaning curve—in the spine of this patient. It is a very minimal curve. If you look at this (indicating), the curve is facing this direction and there is a slight curve in this spine.

Q. In your opinion, what is the origin of that type of slight abnormality? [405]

A. With this type picture, it could be just the position on the X-ray table, it could be a mild change that this patient's spine has undergone through the years, it could be from a spasm of the paravertebral muscles, or the muscles around the spine.

Q. Did your examination satisfy you as to what the cause of this slight abnormality is, Doctor?

A. I found no spasm of the paravertebral muscles or the muscles around the spine, so I would have to eliminate that as a cause. It was either a position change, or a change that has occurred during the patient's growth.

Q. Doctor, are there any other abnormalities shown there?

A. There is very minimal arthritic spurring. I see a little tiny sharp point here (indicating), very minimal. The hips are within normal limits.

Mr. Erickson: May I inquire, so the record shows, what vertebra you are referring to when you say you saw a minimal arthritic change?

A. I think we could say on all the lumbar vertebrae. They are very minimal. The fourth shows a little more than the rest, and perhaps the fifth.

Q. (By Mr. Poore): Now, Doctor, is there any-

(Testimony of Dr. John G. Davidson.)

thing else on that? A. No.

Q. I hand you Defendant's Exhibits 37 and 38, and ask you [406] if you will identify those?

Mr. Erickson: I have no objection to those.

Mr. Poore: We offer Defendant's Exhibits 37 and 38 in evidence.

The Court: Admitted.

(Defendant's Exhibits 37 and 38 received in evidence.)

Q. Will you explain those?

A. Exhibit 37 is a spot film, or a special coned down film of Miss Murphy's very low back and tailbone area, and these show no evidence of any recent or old fractures. The intervertebral spaces may be slightly narrowed in the very back, the intervertebral disc space being the disc space between the bones, but if we compare this space, the space between the fifth lumbar vertebra and the sacrum, if we compare the back part of this space and this space and this space (indicating), it is practically the same. This space (indicating) may be slightly wider, but very little, if any.

Q. Anything else in that X-ray?

A. Well, on here we can see a very little arthritis, a little bit there and a little bit there (indicating), and that is the only thing I could find.

Q. Now, Doctor, on Defendant's Exhibit 38, would you identify that, please?

A. That is a side to side view of the lower back bones of Miss Murphy, and we do see a little more

(Testimony of Dr. John G. Davidson.)

arthritic changes [407] up in the first lumbar and the twelfth dorsal vertebrae. There is also very minimal arthritic changes noted in the second and third lumbar. The disc spaces are essentially the same as on this (indicating). In fact, this is essentially the same picture in the low part of the back.

Q. Thank you, Doctor. Now, Doctor, am I correct, then, that you examined the entire spinal column of Miss Murphy, both as to bony and muscle structures? A. I did.

Q. And would you again summarize what, if any, abnormalities you noticed in that length of her spinal column, as to both bony and muscular structures?

A. I noticed she had very minimal arthritic changes throughout the entire bony structure of the spine, and that there was, perhaps, some narrowing of the disc space between the last lumbar vertebra and the sacrum.

Q. And in the cervical spine, any narrowing of the discs?

A. There was also some narrowing of the disc between the fifth and sixth cervical vertebrae.

Q. Now, Doctor, in your opinion, based upon your examination of the muscular structure and the bony structure of this patient, do you have an opinion, based on reasonable medical certainty, as to whether this person could carry on the job of waitress?

(Testimony of Dr. John G. Davidson.)

A. From my examination, I would say she [408] could.

Q. Now, Doctor, would you mind stepping down here again? I would like to show you some X-rays you haven't seen.

The Court: I think if you are going to start on that, it is time to take a short recess and stretch ourselves. (Jury admonished.) Court will stand in recess until quarter after 11.

(Ten-minute recess.)

Q. Doctor, would you mind stepping down here, please? Doctor, there has been admitted in evidence Defendant's Exhibits No. 19 and No. 26, both of which are X-rays involving the cervical spine taken on or about June 24, 1958, and September 26, 1958. Now, I hand you Defendant's Exhibit 19, taken on or about June 24, 1958, and ask you if you notice any different pathology than you have described from your own X-rays taken in March, 1959?

A. Well, we again see the narrowing of the interspace between the fifth and sixth neck bones, with some arthritis. I would say these are comparable to the films taken in my office.

Q. Do you notice any increased narrowing of the fifth and sixth joint space?

A. As compared to the films I took?

Q. Yes, as compared to the films you took.

A. May I put my film up?

Q. Yes. [409]

(Testimony of Dr. John G. Davidson.)

A. This film was taken 6-24-58 (indicating); my film was taken 3-4-59. Any increased narrowing——

Mr. Erickson: May I make an objection to the explanation from the doctor as to the conditions under which the two pictures were taken? I think his was taken——

The Court: Well, he will make his explanation, and you can cross-examine him on any differences you observe.

A. May I answer?

Mr. Poore: You may answer, Dr. Davidson.

A. If there were to be any increased narrowing, we would have to find it in my films because if this is a progressive thing, it should be more narrow in the films taken almost a year later, and I would say that the width of the interspace that was narrowed is practically the same on the original film as on the film taken in my office.

Q. So am I correct in this, Doctor, that there has been no progressive change?

Mr. Erickson: I object because the Doctor has answered the question, and counsel has misstated the response made by the doctor.

Mr. Poore: Then I will ask the question again, Leif.

Q. No progressive change in the pathology of this patient from June of 1958 to March of 1959, as to the cervical area of the spine so far——

Mr. Erickson: My objection is based on the preceding [410] answer given by the doctor when he said they are practically the same, and this is a

(Testimony of Dr. John G. Davidson.)

restatement of what the doctor is supposed to have said. It is not an accurate statement.

The Court: It is leading. Just ask the doctor the question with reference to that.

Q. Would you indicate if there is any change between the X-rays of June, 1958, and March, 1959?

A. I can see no definite change. The technique in the films are a little different. This one (indicating) is slightly more clear than this (indicating), but if I were to have to say yes or no, I would say there is no definite change.

Q. Now, Doctor, is there any evidence in either of these as to any fracture, compression or otherwise?

A. I can see no evidence of any recent or old fractures in these pictures.

Q. Now, Doctor, I place in the shadowbox along with your picture taken in March of 1959 another X-ray taken in September of 1958, and ask if there is anything in the comparison of those two X-ray photographs that calls for a different conclusion than you have already stated?

A. These two films are more comparable as far as technique is concerned. They are about the same density, and again I would have to say there is no definite change.

Q. Doctor, here again I place in the shadowbox for your examination Plaintiff's Exhibit No. 1 and your X-ray No. 32, [411] taken in March, Exhibit No. 1 being taken on April 11th—no, November 14, 1958, and ask if there is any change noted there?

(Testimony of Dr. John G. Davidson.)

A. The entire cervical spine doesn't show on Plaintiff's Exhibit 1, but we do have a comparable view of the fifth and sixth cervical vertebrae or neck bones, and I can see no change.

Q. Now, Doctor, if you could put in the lumbar photographs, your photographs, or the X-rays that you took, Doctor. Now, Doctor, would you compare the X-rays taken of the lumbar portion of the plaintiff's spine in March, 1959, under your direction and control, with that taken by Dr. Clemmons on April 7, 1959, which is Plaintiff's Exhibit No. 4?

A. May I have mine? It should be a big one like this. Plaintiff's Exhibit 4 as compared to Defendant's Exhibit 39. Do you want to take that out?

Q. Yes, sir.

A. They are reasonably the same. Again there is a slight variation in technique. Exhibit 4 is not as distinct and is more cloudy than this (indicating), and a little more difficult to read, but I would say there is no extreme change between one and the other.

Q. Here is another, Plaintiff's Exhibit No. 3, also of the lumbar or low back area, taken November 14, 1958.

A. Again there is no appreciable difference in the bony [412] picture.

Mr. Poore: You may take the stand. You may cross-examine.

(Testimony of Dr. John G. Davidson.)

Cross-Examination

By Mr. Erickson:

Q. Dr. Davidson, you spoke of the motions of the head and neck in your examination of Miss Murphy, and you spoke of it as being within normal limits. Are there different normal limits for different people, or do you have an exact standard by which you determine what is within normal limits?

A. There is no definite exact standard. Some people are short necked, some people are long necked, and there is usually a little bit more range of motion in a long necked person than in a short necked person. They all have the same number of vertebrae.

Q. Would there be a difference also in older people and younger people?

A. Not necessarily. If an older person has a considerable amount of arthritis, they may have marked limitation of motion. If they do not have any arthritis, they may have as good a motion as a young person.

Q. Then what is normal limits depends upon the opinion of the doctor who is doing the examination, is that correct?

A. That is correct. [413]

Q. Now, Dr. Davidson, you were not here—there are too many doctors in this case to keep them sorted out—you were not here when Dr. Rotar tes-

(Testimony of Dr. John G. Davidson.)

tified, nor when Dr. Clemmons testified, but Dr. Rotar testified that he treated Miss Murphy for spasm and rigidity of the intervertebral muscles as well as spasm and rigidity of the muscles around the cervical spine, and he observed those things as late as a month ago. You found no evidence of them? A. I could find none.

Q. Now, had they been present, assuming that they had been present prior to the time that you made your examination, is that the sort of thing that comes and goes, or may disappear, or are those more or less a permanent thing?

A. It can come and go. Many people with trouble in their neck will complain that their neck bothers them more when the weather changes, when it is damp, when they get cold, it can come and go.

Q. And you say that—I think your testimony is that the arthritic changes you observed in the cervical spine and in the dorsal and lumbar, you would generally characterize as minimal, is that correct?

A. You have to hunt pretty hard to find them.

Q. Now, in reading these X-rays which actually show the shadows of the bony structure, the examination of them is rather a subtle thing, is it not, Doctor, where there can be [414] a wide range of opinion among experts on what they show?

A. No; I don't think there can be a wide range. I would say if we were to take four doctors who have had much experience reading X-rays, that three out of the four would agree pretty closely.

Q. Now, in case of an examination of an X-ray

(Testimony of Dr. John G. Davidson.)

that shows minimal arthritis or a minimal trauma, it would be in an area like that that you would be apt to find greater disagreement, would that be a correct statement?

A. May I have that question again, please?

(Question read back by Reporter.)

A. I don't think so.

Q. There would be some cases, of course, where the picture was so obvious, for example, a picture of a broken femur, that doctors couldn't disagree that it was broken, isn't that correct?

A. If they have had any experience reading films.

Q. Well, in a case of a broken leg where it is broken so badly that the bone protruded out of the skin on one side and out of the skin on the other side, that would be one of those where there wouldn't be any disagreement, isn't that correct?

A. You wouldn't have to have an X-ray.

Q. Now, these changes in joint space in a backbone, normally those changes are very small, are they not, you wouldn't [415] expect to see an inch or half inch or three-quarters of an inch, or anything like that?

A. Well, the intervertebral disc space is never an inch wide. This portion that you see between the bones is approximately the width of an intervertebral disc space, so we never would see an inch change, but we often do see where the disc space

(Testimony of Dr. John G. Davidson.)

has so degenerated that the bones are almost touching, the bone above and below the disc.

Q. The model that you have——

A. Do you want it?

Q. Yes. The model that you have you say is approximately what you would expect in a normal person of average size, is that correct?

A. That's right.

Q. And the narrowing that occurs, and especially as shown in these pictures, is not a thing that you can just take a quick look at the X-ray, that is, the untrained person, and determine whether there is a change or not, isn't that true?

A. Well, if it gets so minute you can measure it with calipers, but we usually don't do that. After you have seen several hundred X-rays, you can estimate the amount of narrowing.

Q. Now, in your testimony on the cervical spine, you said you could see practically no change, and I believe that is a correct statement, between the June, 1958, pictures and the [416] more recent one?

A. That is correct. I don't think, comparing these X-rays, that you can get down to a minute measurement again. If I were to say, as I said before, if I were to say yes or no on the change, I would say no.

Q. But you say instead there is practically no change?

A. I said no because I had to be pinned down to yes or no.

Q. Now, this model, and I would assume that is

(Testimony of Dr. John G. Davidson.)

not a model that you could readily leave here as an exhibit?

A. I wouldn't like to. I use it several times a day.

Q. I wonder if it might be possible with the Court's permission if we agreed that the model might be left with the jury and returned to the Court as soon as the jury is through with its deliberations, would that inconvenience you greatly?

A. If it lasts over Monday, it will.

Q. Well, then, we will forget about it. Now, is this anatomically a correct representation of the lumbar spine and the sacrum?

A. It's within normal limits of an average lumbar spine and sacrum.

Q. And it is because it is a reasonably good anatomical representation of the area, that is the reason you use it, is that correct? [417]

A. That is right.

Q. Now, as an orthopedic surgeon, you made an examination of Miss Murphy, is that correct?

A. I did.

Q. And she gave you a history of herself as a part of your examination?

A. She did; she gave me a history prior to it.

Q. And why do you take a history?

A. Mostly because when we get to Court the lawyers ask about it.

Q. Well, will you give us that history?

A. Miss Murphy stated that while she was shopping in a Safeway Store on East Granite Street

(Testimony of Dr. John G. Davidson.)

on June 24, 1958, she fell flat on her back and struck her head against the floor. She said she slipped on the floor. She stated that she cannot remember how she got up from the fall, but upon getting up, she felt a large bump on the back of the head. She was taken to St. James Hospital by automobile, one of the store clerks driving her to the hospital. She was seen by Dr. Rotar who examined her head and took X-rays. She was given some medication by her physician and was taken home by her brother. Upon arriving home, she became sick to her stomach and remained so for two days. One day following the accident, she stated that she hurt from her head to her ankles and that she was sore all over. She again saw Dr. Rotar [418] and X-rays of the back were taken, and she continued to see him three times a week, then every two weeks until October of 1958. During this time, X-rays of the back and head were taken, that is, recheck X-rays. She has continued to see Dr. Rotar for periodic examinations until the present time. As yet she had not been dismissed from the case. The only treatment given was hot baths, hot packs and an electric pad and some medication. The patient carried this treatment out at her home.

Q. Now, it is a fact, is it not, Doctor, in your own practice you get a history of your patients, either prepared by yourself or by the referring doctor? A. That is right.

Q. And that is a part of your regular procedure when you are going to diagnose?

(Testimony of Dr. John G. Davidson.)

A. That is part of the routine.

Q. And can you say whether or not in practice you do rely somewhat upon the history given in diagnosing the condition? A. We do.

Q. Now, in making a diagnosis as an orthopedic surgeon—I have asked a part of this question before—do you rely entirely upon the X-rays?

A. No.

Q. You have indicated that you have the history in mind, and then you say, you have told us that you also rely on certain [419] muscular tests and nerve tests, is that correct?

A. We examine these patients, and we correlate our history, subjective symptoms, objective symptoms, examination, and X-rays.

Q. Now, in the case of Miss Murphy, she gave you a considerable number of subjective symptoms as you have testified, is that correct?

A. She did, yes.

Q. Now, did you find any evidence from the subjective symptoms she gave you of any contradiction between symptoms and what she claimed her difficulties were, or what she was complaining of?

A. When I examined her, I could find nothing that correlated with her subjective symptoms. She had an almost completely negative examination.

Q. But in moving her head from side to side, she testified to certain pain when moving the head too far? A. She did.

Q. And she was consistent in that objection, is that correct? A. She was.

(Testimony of Dr. John G. Davidson.)

Q. Would that be true also of the lumbar spine, of the complaints she made there?

A. It was, the complaint was consistent.

Q. Yes; that was the point of the question. Now, if Miss [420] Murphy has pain in the lower cervical, and if the testimony shows that she is constantly pulling her head back and working on it with her hands in this manner (demonstrating), and that she complains of pain there, and inability to sleep and so on, assuming those things, do you have anything in your examination that would account for that situation? A. None.

Q. And if the record shows that Miss Murphy complains of pains in her lower back, and that she cannot stay in bed for long periods and that she cannot sit up for long periods because of pain, do you have any explanation from your examination of why that circumstance should exist?

A. None.

Q. Now, if the testimony is that Miss Murphy, prior to June 24, 1958, was an out-going, rather carefree person who liked to be out with other people and play cards, and since then she is nervous, withdrawn and irritable, do you have any explanation from your examination why that condition should exist as it does?

A. I could find no reason why she should have changed.

Q. Did you see any evidence of nervousness?

A. Not particularly, and as I watch her here, I do not see any particular evidence. I have not seen

(Testimony of Dr. John G. Davidson.)

her reach back and bend her head back or put her hands behind her neck during the whole time I have been here. [421]

Q. For the purposes of my questions, Doctor, I will ask you to assume that, and that's the basis of the questioning, if you assumed that situation is true, and your testimony is you could find no reason why she should do that from your examination, is that correct? A. That is right.

Q. As far as your examination is concerned, there is nothing wrong with Miss Murphy at all?

A. Nothing that I could find from the examination except what I have already mentioned.

Q. Now, this minimal narrowing, or the narrowing—I think you characterized it as minimal—that you found in the lumbar spine, you found that in the back of the intervertebral space, isn't that correct? A. That is right.

Q. And in your opinion, that wouldn't affect—it isn't large enough to have any effect on her, is that true?

A. It compares so much to the ones above and below that I could see no reason why it should be affecting the nerves at all. I would say it is within normal limits for Miss Murphy.

Q. Now, this model would show, since it's anatomically correct, the angle that one would expect in a normal spine between the last lumbar vertebra and the sacrum, would it not?

A. It would show the average angle, I would say. If we were [422] to take a hundred people,

(Testimony of Dr. John G. Davidson.)

this would fall in with a 15 or 20 per cent angle in either direction.

Mr. Erickson: May I have a moment, your Honor?

The Court: Yes. Doctor, do I understand your testimony to be to the effect that from your examination, you find nothing abnormal about the body of Miss Murphy, is that the situation?

A. I could find nothing that would prevent her from doing her regular work as a waitress.

The Court: From the standpoint of her body structure?

A. That is correct.

The Court: Do you mean to say that she is not suffering from any condition that might interfere with——

A. She is not suffering from any orthopedic condition. I do not feel qualified——

The Court: That's what I wanted to know, you are not talking about anything except orthopedics?

A. That is correct.

The Court: And when you say that she is not suffering from any condition at all, or that the X-rays or your examination don't disclose any abnormality——

A. I am just considering the orthopedic part of it.

Q. (By Mr. Erickson): And that answer would be the same, and you probably took into account the fact that she would have to carry heavy trays and dishes in a position away from her body,

(Testimony of Dr. John G. Davidson.)

and that sort of thing? Do you have that in [423] mind when you make that answer?

A. I do. There is such minimal changes in those X-rays that I could see no reason if she worked as a waitress before why she couldn't go back and work as a waitress now.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Poore:

Q. Doctor, have you ever visited with Dr. Hammer or Dr. Sawyer or Dr. Rotar about Miss Murphy? A. No; I have not.

Q. The first you have seen of the X-rays other than those taken under your own supervision was up here? A. This is the first time.

Q. Doctor, on the question of the consistency of the objective symptoms or the subjective symptoms, was there any consistency between the subjective symptoms and your objective findings?

A. There was no consistency.

Mr. Poore: We have no further questions.

Mr. Erickson: That is all.

Mr. Poore: May Dr. Davidson be permanently excused, your Honor?

The Court: Yes; he may; thank you, Doctor.

(Witness excused.) [424]

Mr. Erickson: I have Dr. Clemmons here only available now. His testimony will be limited to rebuttal on medical. I would like leave now to call

him out of turn before the defendant finishes his case.

Mr. Poore: The defendant rests, your Honor.

DR. HOWARD M. CLEMMONS

recalled as a witness on behalf of plaintiff, having previously been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. There was one small question I forgot to ask you, Doctor. You gave your distinguished record and training and so forth and I forgot to ask you whether you are licensed to practice medicine in Montana? A. Yes, sir; I am.

Q. Doctor, since your appearance on the stand, Drs. Rotar, Sawyer, Hammer and Davidson have testified, and there are a number of additional X-rays which you have not seen prior to this time, and because there is a difference of opinion as to what the X-rays show, you have been recalled to testify primarily with relation to those X-rays, but before examining on those questions, I would like to ask you whether, as an expert, you can, by examining X-rays of spines alone, just the X-rays, diagnose matters like whether there is a [425] fracture existing or whether there are arthritic changes and the like, or do you need something more than mere X-ray information to form your opinion, generally?

A. We rely partially on history, plus clinical

(Testimony of Dr. Howard M. Clemmons.)

findings, plus X-rays, plus any other additional laboratory tests that are indicated.

Q. Generally, the X-ray is just one of the tools you use, is that correct, in diagnosing cases in which an orthopedic problem is presented?

A. That's correct.

Q. And can you say, Doctor, whether or not there is a considerable area where opinion enters into a determination of what an X-ray shows in a specific case? A. Yes, sir.

Q. So for that reason, for example, in this case, Dr. Sawyer saw rather extensive arthritic changes in the cervical spine, while Drs. Hammer and Davidson did not. Would you say that would be more or less the normal situation among the experts?

A. There is always room for different opinions.

Q. So that based on your own experience you would say that one radiologist might find a fracture in a given situation, and another one minimal arthritis, would that be a correct conclusion?

A. Are you speaking of a fresh fracture or an old fracture?

Q. Well, answer it either way, Doctor, and explain it. [426]

A. Well, in the case of a fresh fracture, there might be less room for variation of opinion than with the evidences of an old fracture as compared with the appearance of arthritis.

Q. Now, in the case of fractures, particularly of the vertebrae, and arthritis of the vertebrae, your

(Testimony of Dr. Howard M. Clemmons.)

prior testimony was that, in your opinion, the appearance of the cervical spine indicated a possible fracture of the fifth and sixth, or fifth or sixth vertebra, will you now look at your X-rays and state whether or not it is still your opinion that those vertebrae show evidence of a compression fracture?

Mr. Poore: To which the defendant objects as improper rebuttal, it is merely cumulative.

Mr. Erickson: I shall compare one of the later X-rays then after that question, your Honor.

The Court: Well, I'll have to sustain the objection, counsel. We are not going to go through all of Dr. Clemmons' X-rays again and have him tell us again what he told us the last time he was on the stand. He can rebut anything new that has been developed in the case of the defendant, but otherwise, we are not going to listen again to an examination of all these X-rays and have him tell us the same thing about them.

Mr. Erickson: I will confine the examination, then, your Honor, if that is proper, to a comparison of the X-rays of the cervical spine taken by others with his and not repeat [427] the same ground.

Q. Now, I call your attention to Defendant's Exhibit 32. Do you recognize that—I will inform you that is an X-ray of Miss Murphy which was taken on the 4th of March of this year, and have you compare it with the X-ray which is Plaintiff's Exhibit 1, and tell us first whether that shows the same general area that is covered by your X-ray?

(Testimony of Dr. Howard M. Clemmons.)

Mr. Poore: To which the defendant renews the objection that it is merely cumulative of evidence already introduced by the plaintiff.

The Court: Overruled. This is comparing the new X-rays that have been introduced. Doctor, I think if you stand on the other side of the machine, the reporter can get your voice better.

A. They both show the same general area, the cervical spine or the neck vertebrae, both taken from the same position, a lateral view, a side view, and in arriving at the diagnosis I made, and in comparing the film taken——

Q. November, 1958.

A. ——November, 1958, with this one on the right taken the 4th of March, 1959, the appearance of the various vertebrae must be compared, and you will notice that the lower and front margin of all of these cervical vertebrae down to the fifth show a hook-like projection in the front, and the top of the adjacent vertebrae is rather smooth and rounded off. [428] Now, when we reach this level (indicating), this beak or spur-like projection which in these other vertebrae is normal is missing from this one, from the lower and front side. It is squared off, and the top of the vertebrae below, which is the sixth, has a notch in it. Now, one must ask himself why does that appearance differ, and the obvious answer to me is that the two vertebrae came together very sharply, because the square-like projection on the bottom——

The Court: Pardon me, let me interrupt. Is the

(Testimony of Dr. Howard M. Clemmons.)

Doctor just explaining again what his opinion was in the matter? Is there a difference between these two X-rays?

A. Their appearance is very similar.

The Court: Well, then you are not rebutting anything by the comparison. I think the other doctors have all said they appear to be the same.

Q. (By Mr. Erickson): Is there a difference in the appearance in this picture taken in March of 1959, with your pictures taken in 1958?

A. They are essentially the same.

Q. Any change in the intervertebral space between the two? A. Not essentially, no.

Q. I now show you Defendant's Exhibit 19—oh, one more question. Is there any significance to the fact that the angle is different where the picture is taken in the March X-ray, and the one you took? [429]

A. There isn't any difference or great degree of variation in position that would make any difference in the interpretation of the film.

Q. Now, comparing your X-ray with No. 19, which was also taken in March, can you see any significant difference between that X-ray and the one taken by you or under your direction?

A. There is some slight decrease in the intervertebral space in this film (indicating), as compared with the earlier one.

Q. Now, this is your earlier one here, which is No. 1, and this is the later one (indicating)?

A. Yes.

(Testimony of Dr. Howard M. Clemmons.)

Q. And there is a slight decrease in the later film, is that correct? A. Some decrease, yes.

Q. Now, is there any significance to be attached to the examination of the series of three, which includes your first one taken in November, 1958, your second one taken in April, 1959, and now this later one taken in March of 1959, is there any significant change there, and, if so, tell us what it means?

A. There is no significant change in the X-ray appearance itself, which, of course, is only one of the factors taken into consideration, as we stated earlier. [430]

Q. So as far as the X-rays are concerned, except for some slight decrease that you noted in No. 19 over your No. 1, you can see no significant change?

A. That is the only significant change.

Q. Now, if you will take the stand again, Doctor. Now, Dr. Davidson produced in court a model of the lumbar spine and the sacrum. Would you recognize that as a model that would be anatomically correct? A. Yes, sir.

Q. And it should show and would show the normal condition, particularly with relation to the angle between the lower lumbar and the sacrum?

A. That's correct.

Q. Would you illustrate on that what that angle is?

A. Well, drawing a line vertically through the body of the fifth lumbar vertebra, and another one parallel with the long axis of the upper end of the

(Testimony of Dr. Howard M. Clemmons.)

sacrum, the angle is, in this particular model, about 30 degrees.

Q. You are now indicating an angle, Doctor, that comes down along the middle of these two lower lumbar in its relationship to the axis of the sacrum, is that correct?

A. That's right; the angle between the fifth lumbar and the sacrum.

Q. Now, in comparing that model with—do you have Exhibits 2, 3, and 4 any place? Now, Doctor, if you will step down again to the viewbox here, and with the model in mind—first, [431] it has been suggested, Doctor, that the X-rays that you took or had taken, which are Exhibits 5 and 6, are taken from an angle so that they would not adequately show the angle between the lumbar and the sacrum, and further that they would not adequately represent any increase or decrease in joint space over normal. What do you have to say as to that?

Mr. Poore: Again to which the defendant objects as to improper rebuttal testimony.

Mr. Erickson: That is rebuttal, your Honor, since there was a direct attack on the exhibit.

The Court: Yes; I will overrule the objection. You may explain.

A. The two films here were both taken with the patient lying with the left side down and the film is to the patient's left, underneath the patient lying in this position, and the film in this position (illustrating), and the tube would be here (indicating). I think that is a true representation of the angle

(Testimony of Dr. Howard M. Clemmons.)

between the last lumbar vertebra and the sacrum, and, furthermore, one would expect, since the patient was not weight bearing, that is, standing and erect at the time, that the structures would be in a more relaxed position, which gives more significance to the finding of increase——

Mr. Poore: Just a minute, we object to this as not being responsive to the question. The question is just whether the [432] X-rays were taken at an angle that accurately reflects——

The Court: That's the question.

Q. You say that it does, they are taken at an angle so you can see adequately any increase or decrease in the intervertebral space in the lower lumbar, and they would also adequately show any significant change in the angle between the lower lumbar and the sacrum, is that correct?

A. Yes, sir.

Q. And it has been suggested that there is some overlapping, apparent in the picture of some vertebrae. If there is such overlapping, does it make it difficult or impossible to tell those two factors?

A. No, sir.

Q. And as an orthopedic surgeon and qualified as an expert, in your opinion, those two X-rays are sufficient and adequate to show whether or not—what the joint space is, and the intervertebral space in the lower lumbar—— A. Yes.

Mr. Poore: Just a moment——

The Court: Wait until he finishes the question.

Q. ——and the angle?

(Testimony of Dr. Howard M. Clemmons.)

Mr. Poore: To which we object as leading and suggestive.

The Court: Sustained.

Q. In your opinion as an expert——

The Court: Oh, pardon me, that was an expert question? [433]

Mr. Erickson: Yes.

The Court: I am sorry; the objection is overruled.

Q. What is the answer? A. Yes, sir.

Q. They are, is that correct? A. Yes, sir.

Q. Now, then, Doctor, if you will compare those two X-rays with the model which both you and Dr. Davidson agree is anatomically correct and should represent the normal spine, and particularly the angle, will you say whether or not, by comparison of the two, there is any significant change in the angle of the lower lumbar and the sacrum as shown by the X-rays which are Exhibits 5 and 6?

Mr. Poore: To which the defendant objects upon the ground and for the reason it is merely cumulative, the plaintiff is working with her own exhibits, it is purely cumulative and corroborative of this witness' testimony previously given.

The Court: Yes; I don't see——

Mr. Erickson: Dr. Davidson says there wasn't an unusual angle and produced this model to show what the usual angle would be.

Mr. Roth: Your Honor, if it please the Court, Dr. Davidson never testified with regard to the curvature of the lumbar spine. [434]

(Testimony of Dr. Howard M. Clemmons.)

The Court: I don't think he did.

Mr. Roth: Nor did he use this model in connection——

The Court: I'll sustain the objection.

Q. Dr. Clemmons, when a patient who you are examining gives you what are called subjective symptoms, do you give those statements of subjective symptoms any value in your diagnosis?

A. Yes, sir.

Q. And would that be particularly true if the patient made the same complaints of pain relating to the same area each time you touched the area or manipulated it? A. Yes, sir.

Q. And that is one of the bases for diagnosis, is that correct?

A. That is one of the factors taken into consideration, yes, sir.

Q. Now, in addition to the—strike that, please. You testified heretofore about nervousness of the plaintiff. Could nervousness be a possible complication of injuries that could have been received as a result of the hypothetical situation I presented to you? A. Yes, sir.

Mr. Poore: To which the defendant objects upon the ground it is improper rebuttal, cumulative.

The Court: Yes; I don't see it rebuts anything, counsel, at [435] all.

Mr. Erickson: Dr. Davidson said he found no nervousness.

The Court: He said he found no nervousness.

(Testimony of Dr. Howard M. Clemmons.)

He had already said he had found it. They are just in conflict is all.

Mr. Erickson: Nothing further from Dr. Clemmons.

Mr. Poore: No cross-examination.

The Court: Thank you, Doctor; you are excused.

(Witness excused.)

The Court: Do you have any further rebuttal?

Mr. Erickson: Very short rebuttal, your Honor.

The Court: How short is it? Is it worth the jury's time—do you think 10 or 15 minutes would do it so they wouldn't have to come back this afternoon?

Mr. Erickson: I believe we could, your Honor.

The Court: Very well, we will try and see if we can finish it up.

MARGARET ROSA

recalled as a witness on behalf of plaintiff, having previously been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Mrs. Rosa, you heard Rose Ledingham testify, did you not? A. Yes; I did. [436]

Q. Did you have a conversation with Mrs. Ledingham some time after June 24, 1958, with relation to the fall sustained by your sister?

A. Yes; I did, while I was getting some groceries at Safeway.

(Testimony of Margaret Rosa.)

Q. Did you have more than one conversation with her? A. No; that was the only one.

Q. And it was relating to the accident and your sister, is that correct?

A. Yes; she asked me how she was feeling——

Mr. Poore: To which we object upon the ground and for the reason it is merely hearsay testimony, not intending to impeach, no foundation having been laid for impeachment of any witness.

Mr. Erickson: Mrs. Ledingham was an employee——

The Court: Yes, and Mrs. Ledingham testified with reference to the conversation. Proceed, the objection is overruled.

A. She asked me how my sister felt, and I told her.

Q. Speak up.

A. She asked me how my sister was feeling, so I told her, and she told me she got a terrible fall, that everyone heard the bump that she got, and I asked her if she was the one that went to the hospital with her, and she said she was, and she said that while she was with her that she had nothing to say when she asked her how she was, and she would just nod her heard, and she was afraid she would pass out completely on [437] her while she was with her.

Q. Was that the sum and substance of the conversation between you and Rose Ledingham?

A. Yes; while I was getting my groceries checked out.

(Testimony of Margaret Rosa.)

Q. Did she say anything to you at that time about your sister having talked about the weather on that trip? A. She said she said nothing.

Q. And did she say anything to you about your sister having wet shoes? A. No.

Q. That was the whole conversation, is that correct? A. That's right.

Q. Now, Mrs. Rosa, you have kept house for years, have you not?

A. Yes; I have, for 30 years.

Q. And you have kept house in homes where there is linoleum and tile on the floor, is that correct? A. Yes.

Q. Do you still do that?

A. I don't use too much wax.

Q. You have linoleum on the floor, is that correct? A. I have inlaid on the floor.

Q. And over the years have you used the so-called liquid waxes to wax your floors?

A. Yes. [438]

Q. And have you done that a good many times?

A. Yes; I have.

Q. And can you say whether or not from your experience liquid self-polishing waxes tend to build up on floors? A. Yes; it does.

Mr. Poore: To which the defendant objects on the ground and for the reason there is no showing of a proper foundation, no qualification of the witness, no proof of the similarity of conditions or the situation of the two floors or the two waxes. It is incompetent, irrelevant and immaterial.

(Testimony of Margaret Rosa.)

Mr. Erickson: May I say the only difference that I can see, your Honor, is the wax itself. One of them is Waxcraft, which she has never used, of course——

The Court: This is in rebuttal to Mr. Rodoni's testimony that it doesn't build up, is that it?

Mr. Erickson: And that it doesn't become slippery, both of them, and I believe that a housewife would probably qualify.

Mr. Poore: If it please the Court, there is two complete differences, the difference in the floor covering itself, and the difference in the two waxes. We believe the Montana rule—this is in the nature of testimony of an experiment—the Montana rule is that the conditions have to be substantially the same. We don't believe that foundation [439] has been or could be laid for that testimony.

Mr. Erickson: It will not be an experiment.

The Court: I'll overrule the objection; you may answer.

Mr. Erickson: Would you read that last question?

(Question and answer read back by Reporter.)

A. Yes; waxes do build up on floors.

Q. And that is particularly true of self-polishing? A. Yes; all those waxes.

Q. And is it difficult to remove that wax?

A. Well, you don't remove it with soap and water.

(Testimony of Margaret Rosa.)

Q. What do you do to remove it?

A. You have to get a solution to remove it all off.

Q. You heard Mr. Rodoni say that he used extremely hot water and lye. Would that be a method?

A. Well, I don't know about lye, but I know soap and water won't take it off.

Q. Now, can you say whether or not, from your experience with liquid self-polishing wax, whether or not when it builds up, it tends to become slippery? A. Yes; they do.

Mr. Poore: Again the defendant raises the same objection for the purposes of the record.

The Court: Overruled.

Q. And do you know by comparison between paste wax and liquid wax if there is any difference in the degree of [440] slipperiness between the two?

A. I don't see any difference in it.

Mr. Erickson: That is all.

The Court: Have you had any experience with paste wax?

A. Yes.

The Court: How long did you use it?

A. Well, I have used wax for 35 years or better.

The Court: How long has it been since you have used paste wax?

A. About four or five years.

(Testimony of Margaret Rosa.)

Cross-Examination

By Mr. Poore:

Q. Mrs. Rosa, what has been your familiarity with Waxcraft Heavy Duty?

A. Well, I have never used Waxcraft.

Q. You have never seen it? A. No.

Q. Never endeavored to apply it? A. No.

Q. Never endeavored to remove it?

A. No; I have never used that wax.

Mr. Poore: No further questions.

Mr. Erickson: That's all.

(Witness excused.) [441]

MILDRED MURPHY

the plaintiff, recalled as a witness on her own behalf, having previously been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Miss Murphy, you have heard the testimony of the witness, Rose Ledingham, have you not?

A. Yes.

Q. And she testified that on your trip from the store over to the hospital, you talked with her about the weather. Do you recall anything like that?

A. No; I didn't.

Q. Are you sure you didn't?

A. I don't recall it; yes; I am sure.

Q. What was your condition at that time?

(Testimony of Mildred Murphy.)

A. I was more or less a little on the sleepy side; I was afraid I was going to fall asleep; I was more or less trying to stay awake, and I was dazed, dizzy.

Q. How far is it from Safeway over to St. James Hospital?

A. Oh, if I stopped to count the blocks, I would know, but I couldn't do it right now.

Q. Would you say about eight or 10 blocks?

A. Oh, roughly, I don't think it's that far.

Q. You think it is less than that?

A. I think so. [442]

Q. Do you recall, Miss Murphy, whether you drove directly from the store to the hospital?

A. Yes.

Q. There were no stops any place?

A. Stop lights.

Q. But other than that, no stops?

A. No.

Q. Now, Mrs. Ledingham said she suggested to you, or didn't suggest, that she started talking about it being rainy and that your shoes were wet? Do you recall anything like that?

A. Never mentioned it as far as I know, no, she didn't say it. All she said was, "What hospital," and I said, "St. James."

Q. Do you know whether you were conscious during all that time?

A. Yes. I was dazed, but I wasn't unconscious, I know that.

Q. Now, with relation to whether it was raining, your testimony originally was that it was cloudy

(Testimony of Mildred Murphy.)

and that it may have been raining. Now, in view of Mrs. Ledingham's testimony that it actually was raining, what is your recollection?

A. You mean that day?

Q. Yes, at the time you went to Safeway.

A. It had rained.

Q. But was it raining at the time you went to Safeway? [443]

A. At that time it wasn't; it had rained.

Q. Were you wearing a raincoat? A. No.

Q. Now, her testimony is that you said your shoes were wet, and you say you didn't. Were your shoes wet?

A. Well, they couldn't be, I hadn't been out long enough to wet them. I don't see how they could be, I don't think they were.

Q. Where was your brother Frank's car parked when you left home that morning?

A. In front of the house.

Q. And the street comes right up to within 10 or 15 feet of your house, does it not?

A. Just about.

Q. Had you gotten out of the car to shop around town after you left your home and before you got to Safeway? A. No.

Q. You went directly to Safeway, is that correct?

A. No; he went down and got gas and then went up to Safeway.

Q. And you stayed in the car?

A. I stayed in the car.

(Testimony of Mildred Murphy.)

Q. Do you recall whether the sidewalk was wet under the canopy? A. No; it wasn't wet.

Mr. Poore: To which we object as merely cumulative. [444]

The Court: Overruled.

Q. Now, you have not seen these pictures before that were introduced as evidence, they being Exhibits 9, 10, 11 and 12, have you seen these before now? A. Not clearly.

Q. You will have to speak up. Now, showing you, let's start in with No. 11, would you recognize that as generally the appearance of the store, looking toward the front? A. Yes.

Q. Can you say whether or not those carts were there in the store on June 24, 1958?

A. I think so.

Q. Now, I will show you Exhibit 12 which shows the produce counter. Is that about where the produce counter was on June 24, 1958?

A. It looks like it to me.

Q. Now, there was testimony that the corner of that produce counter was rounded off in 1958, and that it may have been a little further to the right than it is on the picture. Can you say from your own recollection whether that would be true or not?

Mr. Poore: To which the defendant objects as leading and suggestive.

The Court: Well, it is, but answer this one.

A. Do you mean to say that the counter was round? [445]

Q. Yes.

(Testimony of Mildred Murphy.)

A. Well, I wouldn't pay that much attention.

Q. So you wouldn't know about that. Now, the testimony has been, and Rose Ledingham has testified that she saw you, that you were lying as indicated on Defendant's Exhibit 10, that is, with your head pointing towards the front of the store, and your feet toward the rear, and just at the entrance to the aisle where the coffee was. Now, look at that picture and see whether you agree that that is where you were?

A. Let's see that other one, I can tell from that better.

Q. You can tell better from another picture, which would be No. 9?

A. I wouldn't say. This is more like it, this one here (indicating).

Q. Now, speak up.

A. I got to about the edge of that produce counter, and then my feet were just taken from me, you know, just taken from me, and then I fell flat. It would be about there, I guess.

Q. You say "about there." Now, you are indicating that—— A. As far as I can think.

Q. You would be a little more to the left as you face the picture? A. Yes.

Q. In other words, a little closer to the produce counter? [446] A. That's right.

Mr. Erickson: I think that's all.

Mr. Poore: We have no cross-examination.

(Witness excused.)

Mr. Erickson: The plaintiff rests.

The Court: Very well, there is no further testimony?

Mr. Poore: No further testimony.

The Court: Very well. (Jury admonished.) You are excused from further attendance upon the Court until Monday morning, at 9:30, be back Monday morning at 9:30.

What time this afternoon shall we meet together, counsel?

Mr. Poore: At the Court's convenience, your Honor.

The Court: Shall we make it 2:00 o'clock?

Mr. Erickson: 2:00 o'clock is fine.

(Noon recess.)

(Thereafter, at 2:00 o'clock p.m. on Saturday, April 18, 1959, in the absence of the jury, the following proceedings were had:)

Mr. Poore: If the Court please, the defendant requests leave to amend the motion for judgment of dismissal which has been filed with the Court and made orally in open Court in the following particulars, namely: To change by interlineation the title from "Motion for Dismissal" to "Motion for Directed Verdict," and then by interlineation, cause the motion to read, "Comes now the defendant, Safeway Stores, Incorporated, [447] at the close of plaintiff's evidence, and after the plaintiff has rested her case in chief, and respectfully moves the Court to direct a verdict for the defendant, and dismiss

the plaintiff's action upon the following grounds and for the following reasons," and as so amended, the motion to stand.

Mr. Erickson: The objection of the plaintiff to the amended motion will be the same as to the original motion.

The Court: The motion is granted to amend, and the record can show that the objection heretofore made will stand to the amended motion.

Mr. Poore: Comes now the defendant after the close of all the evidence and after both parties have rested, and respectfully moves the court for a directed verdict upon the grounds and for the reasons as specified in the motion for directed verdict which the Court now has under advisement, and upon the further ground and for the further reason that no evidence whatsoever has been adduced by either party in the trial of the case from which reasonable men could conclude that the plaintiff fell as the direct and proximate result of any negligent act or omission of this defendant pertinent to the maintenance of its store floor.

Mr. Erickson: I would object to that motion, your Honor, on the same grounds heretofore given, plus the fact that we believe all the evidence shows the existence of actionable negligence and the injury resulting as the proximate cause [448] thereof.

The Court: I will reserve ruling on the motion and we can proceed to settle instructions.

(Thereupon, the further trial of said cause was recessed until Monday morning, April 20,

1959, at 9:30 o'clock a.m., at which time the following proceedings were had in the presence of the jury:)

The Court: Let the record show that plaintiff has withdrawn Proposed Instructions Nos. 2, 5, 6, 9, 10, 12, 13 and 14, and the Court will give Plaintiff's Instructions 1, 4, 7, 8, 11, 11a, 15 and 16, and the Court has refused Plaintiff's Instruction 3; and that the defendant has withdrawn its Proposed Instructions 1, 2, 3, 4, 5, 14, 15, 18, 23, 24, 25, 26, 27 and 28, and that the Court has refused No. 9, as included in the instructions that will be given; and the Court will give Defendant's Instructions 6, 7, 8, 10, 11, 12, 13, 16, 17, 19, 20, 21, 22, and you may put those in the file.

The parties may have each an hour to argue, and the plaintiff may now open.

(Thereafter, Mr. Erickson opened the arguments on behalf of the plaintiff, Mr. Poore argued the case on behalf of the defendant, and Mr. Erickson closed the arguments on behalf of plaintiff, and thereafter the Court instructed the jury as follows:) [449]

Jury Charge

The Court: Ladies and gentlemen of the jury, you have now heard the evidence in the case and the arguments of counsel, and it is now the time for me to instruct you with reference to the law governing the case, and although you, as jurors, are the sole judges of the facts of the case, you are

duty bound to follow the law as stated by me in these instructions, and apply the law so given to you to the facts as you find them from the evidence before you.

Now, in considering these instructions that I give you, do not single out any one instruction or any one thing I say along as stating the law, but consider everything I have to say, all of my instructions as a whole.

Now, you are not concerned with the wisdom of the law, as I pointed out to you when you were examined at the start of the case. Regardless of any opinion you may have as to what the law is, or what it ought to be, it is your sworn duty to base a verdict only upon the law as I give it to you.

Now, in the first place, let me say this: This is a case involving on the one hand an individual and on the other hand Safeway Stores, a corporation. In deciding the issues of this case, don't differentiate between the individual and the corporation. Each one of them comes here before this Court and before you, as officers of this Court, entitled to a fair and impartial trial, and you can only give each of [450] the parties that if you treat them equally. This Court and our system of justice is not designed so that the well to do, or the corporations are above the law in any regard, nor that the poor do not have the full opportunity for the protection of the law, but all, individuals and corporations, rich and poor alike, are to be treated equally in the Court, to be treated equally by you jurors, and in that connection, I suggest to you that the sugges-

tions of counsel that the corporation is well able to pay for any damages that it may have caused is not for your consideration. The thing that you have to determine is, did they cause the damage, and, if so, what is that damage, not whether they can pay it or not, or whether you should be liberal or not with somebody else's money, but what are the damages.

The case is, as has been suggested by counsel, not too involved, as you understand from the arguments of counsel and the evidence that has been presented to you. The plaintiff on the one hand says that she walked into Safeway Store, who invited her in by having a store there to sell groceries, invited her in there, and she walked in, walked in carefully, just as she had on many, many occasions, and then walking on the floor, suddenly her feet slipped out from under her, and she fell, receiving the injuries that have been described to you. She alleges that that falling and that slipping that she suffered were the result of the negligence of the defendant, [451] and that the injuries that she has received are the result of that fall.

Now, on the other hand, the defendant has denied that it, the Safeway Stores, through its agents and servants, is responsible, that they are at fault. They deny that they were negligent. They don't deny that Miss Murphy fell, but they deny that they were responsible, that they were negligent, that they did anything to cause her to fall, and on the other hand say if there is any negligence here, it was the contributory negligence of the plaintiff herself, Miss

Murphy, that caused her injuries. That's the simple status of the case.

Now, in that connection, the burden is upon the plaintiff, Miss Murphy, to prove by a preponderance of the evidence that the defendant was negligent, and that such negligence was the proximate cause of injury to her.

Now, first let me say that by a preponderance of evidence is meant the greater weight of the evidence, as you analyze it. Not how many testified to one thing, as compared to how many testified contrarily, but where does the weight of the evidence lie in the light of what everyone has said, and in the light of the other physical facts or other exhibits or other evidence in the case.

You are also instructed that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have [452] done. In other words, negligence is the failure to use ordinary care under the circumstances. Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

As I have said, the burden is upon the plaintiff to prove her case by a preponderance of the evidence, that the injury was caused by the negligence of the defendant, and that that negligence was the proximate cause of the injuries that she suffered, if any, and in that connection, you are instructed

that proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any new cause, produces the injury, and without which the injury would not have occurred.

Now, I think, as has been stated by both counsel in the course of their argument to you, neither the fact of injury, if any, to the plaintiff, nor the mere fact that an accident happened, considered alone, support an inference of negligence on the part of the defendant.

And you are instructed that in this case there is no burden upon the defendant to show how the accident happened, but the burden is upon the plaintiff to prove to your satisfaction, by the preponderance of the evidence, that it happened as the direct and proximate result of some negligent act of omission of the defendant. As I have explained to [453] you, preponderance of the evidence means just the greater weight of the evidence.

In that connection, you are instructed that the testimony of one witness is sufficient to—one witness who satisfies your minds is sufficient to prove any fact in the case.

Your power of judging the effect of evidence in the case is not arbitrary. It must be exercised with legal discretion and in subordination to the rules of evidence. You are not bound, as I said, to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, as against a less number, or as against a

presumption or other evidence which does satisfy your mind. As I say, you are the sole judges of the credibility of the witnesses and the weight that their testimony deserves.

In the first place, a witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, or by the character of the testimony that he gives, or by contradictory evidence. So you should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of your belief. Consider each witness' intelligence, motive and state of mind, his demeanor and manner while testifying on the stand, and consider also the relation each witness may bear to either side of the case, or [454] the manner in which any witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Now, inconsistencies and discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you, as the jury, to discredit such testimony. Two or more persons witnessing an incident or an accident, or reporting a conversation, may see or hear it differently, and innocent misrecollection is a thing that we are all aware of, just like the failure to recollect at all. It is not an uncommon experience for any of us. But, in weighing the effect of a discrep-

ancy in the testimony of witnesses, consider whether it pertains to a matter of importance, or just of unimportant detail, and whether the discrepancy results from innocent error or forgetfulness, or from wilful falsehood. Now, if you find that the presumption of truthfulness is outweighed as to any witness, then you will give the testimony of that witness just such credibility, if any, as you may think it deserves. You are the judges of that. In deciding on which side the preponderance or weight of evidence is, the jury should take into consideration the opportunity of the several witnesses of seeing or knowing the things about which they testify, their conduct and demeanor while testifying, and their interest or lack of interest in [455] the result of the case, the relationship or connection, if any, between the witness and the parties, and the apparent consistencies and fairness of the evidence, the probability or improbability of the truth of their statements, in view of all the other evidence and facts and circumstances which have been proved upon the trial; and from all of these circumstances of the case, determine upon which side, then, the preponderance of the evidence and the weight lie.

Now, in connection with weighing the credibility of witnesses and the weight you should give the testimony of the various witnesses, you are advised and instructed that the rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses, that is, a person

who, by education, study and experience, has become an expert in an art or profession, and who is called as a witness to give his opinion as to any such matters in which he is versed and experienced, and which is material to the case. Now, you should consider such expert opinion, that is, the doctors who testified here, they were qualified as experts and gave voice to their opinions in the matter, so you should consider the expert opinions of the doctors, and should weigh the reasons, if any, given for their opinions. You are not bound by the opinion of any one or any of them, but give to the expert opinion the weight which you deem it is entitled to, [456] whether that be great or slight, and you may reject it, as I say, if, in your opinion, the reasons given for it are not sound and carry no conviction to you. In this case, there is a conflict, a conflict exists in the testimony of the expert witnesses, and you must, then, as jurors resolve the conflict, and to that end you must weigh one expert's opinion against that of the other and the other evidence in the case, and the reasons given by the one against those of the other, and the relative credibility and knowledge of the experts who have testified. That is one of the problems that you have as judges of the facts of this case.

Now, the defendant, as I think I mentioned earlier, the defendant is a corporation, and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in con-

templation of law, the acts and omissions of the corporation, whose agent he is. Now, there is no argument in this case that the store was operated by the manager of the Safeway corporation, and the waxing and the cleaning of the store was done by agents of the Safeway corporation, and so you have no problem with reference to that. The acts described were done by agents, servants of the corporation, and are, therefore, the acts of the defendant corporation.

Now, when a store is open for business like the Safeway [457] store here, one who enters it to purchase groceries as they sell them there does so at the implied, if not the express, invitation of the Safeway Stores, the owner of the store, and that person who goes in there is called an invitee, and upon the owner of the store the law places the duty to exercise ordinary care so as not unnecessarily to expose the invitee, the patron, to danger or accident, and to that end to keep the store in a reasonably safe condition, and to keep the aisles and passageways, and the general store premises made available for the patron's use, to keep them safe, in a reasonably safe condition so as not to expose such patron to danger or injury.

In applying the rules of law that have been and will be further stated to you by the Court to the facts of this case, and in judging the conduct of the parties, you may consider the fact that the attention of persons who visit stores ordinarily is attracted by the display of the goods and wares, the

groceries and other articles offered for sale, and they may be more or less absorbed by the transactions which they have in mind when they go into the store to buy. You may consider whether the defendant anticipated that fact with ordinary care in the exercise of the duty which I have already defined, and also whether the plaintiff here, Miss Murphy, did or did not share that ordinary experience of store business of looking around and being occupied with the transactions she [458] had in mind, and, if so, what effect that fact had on her conduct in relation to the cause of the accident here. Storekeepers are under the duty to keep the floors of their premises reasonably safe, as I say, for the people who are invited to pass over them. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which is superior to the right, or to the duty to use ordinary prudence and caution to avoid injury to those who come upon the premises. If a storekeeper has a floor waxed or polished, it must be done in such a manner that it remains reasonably safe for the invitee, for the people that the store owner, in this case, Safeway, invites into the store to do business.

In this connection, you are advised that Safeway Stores, however, is not an insurer of the safety of its customers. It is bound only to use ordinary care to keep its store premises in such a condition that those invited there may not be unnecessarily exposed to danger. The fact that a floor is polished

or slick does not of itself establish that the store owner is negligent in his choice or application of the floor dressing, or that it is dangerous to the public, or to those invited to use it. A store owner, such as Safeway in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is [459] negligent in the materials he uses for the treatment or the manner of applying them, or the creation of a dangerously slippery condition, so that thereafter the floor is not reasonably safe for its intended use by the customers in the store.

Slipperiness is an elastic term, of course. It does not necessarily follow from the fact that a store floor is slippery that the store owner has been negligent, and that the floor is dangerous to walk on. It is the degree of slipperiness that determines whether reasonable care has been exercised in maintaining the floor and whether the floor is reasonably safe for use. Now, whether this particular floor in this case was slippery, and, if so, whether it was so slippery as to be dangerous to walk on at the time the plaintiff was using it is a question of fact for you to determine from a preponderance of the evidence and the instructions of the Court, as I am giving them to you.

The mere fact that some act or omission of the plaintiff contributed to her injury does not of itself bar a recovery by her. A plaintiff is barred from recovery under the theory of contributory negli-

gence only if some conduct of her own was negligent, and was also a proximate cause of her injury. Have in mind also that the defense of contributory negligence is an affirmative defense, and if it has not been established by a preponderance of the evidence, your finding on that issue [460] as to whether or not there has been contributory negligence must be then in favor of the plaintiff, if the defendant, as I say, has not established the defense by a preponderance of the evidence. The test of contributory negligence is whether the plaintiff in the circumstances acted as an ordinarily prudent woman.

Now, the fact that this case is submitted to you for decision is not indication whatever that there is or is not liability on the part of the defendant, nor is it any indication that in the opinion of the Court there is or is not liability. It is for you to determine from the evidence, and the law as given by these instructions whether or not there is liability, and you must determine this question first, and if you find that the plaintiff has not established a case of liability by a preponderance of the evidence, you shall not consider any other question in the case, but shall find for the defendant, Safeway Stores.

If, on the other hand, you should find that the defendant, Safeway Stores, is liable under these instructions and the evidence, then you shall consider the question of damages. The amount sued for by the plaintiff in her complaint is no criteria of the measure of the amount of damages which

you should award the plaintiff, other than you may in no event allow anything in excess of that amount. The amount sued for here is the sum of $59,650, so under no event could you allow [461] more than that.

If under my instructions here and the facts you should find that the plaintiff is entitled to a verdict against the defendant, it will then be your duty to award plaintiff such amount of damages as will compensate her reasonably for all detriment suffered by her, and of which defendant's negligence, as found by you, if you so find, was a proximate cause, whether such detriment could have been anticipated or not. If, under my instructions, you should find that the plaintiff is entitled to a verdict, then, in arriving at the amount of the award, you shall determine each of the items of claimed damage which I am now about to mention to you, provided that you find them to have been suffered by her, and as the proximate result of the negligence of the defendant:

1. The reasonable value, not exceeding the cost to said plaintiff, of the examination, attention and care by physicians and surgeons reasonably required and actually given in the treatment of the plaintiff, and reasonably certain to be required to be given in her future treatment, if any, and including such care, X-ray pictures, if any, as are reasonably necessary. In this connection, as was mentioned, I think, by counsel both for the plaintiff and the defendant, you are to eliminate from any

fixing of damages the amount charged by Dr. Clemmons for his examination of Miss Murphy. As was explained to you, I believe, by counsel themselves, Dr. [462] Clemmons did not treat Miss Murphy as an attending and treating physician concerned with and responsible for her care, but only examined her for the purposes of being an expert witness and testifying in the trial of the case, so you will not allow any damages, if, under all of these instructions, you ever arrive at the point where you consider the question of damages, you will not allow any damages for the expenses charged by Dr. Clemmons.

2. The reasonable value, not exceeding the cost to said plaintiff, of hospital accommodations and care, if any, reasonably required and actually given in the treatment of the plaintiff, and reasonably certain to be required to be given in her future treatment, if any.

3. The reasonable value of time lost, if any, from employment by the plaintiff since her injury wherein she has been unable to resume her occupation. In determining this amount, you should consider evidence of the plaintiff's earning capacity, her earnings, and the manner in which she ordinarily occupied her time before the injury, and find what she was reasonably certain to have earned in the time lost had she not been disabled, if you find she is so disabled. If you should find that the plaintiff's power to earn money has been so impaired by the injury in question that she will suffer a loss of

earning power in the future from that impairment, then you will award her such sum as will compensate her [463] reasonably for such future detriment as she is reasonably certain to suffer. Even if a person was not gainfully employed at the time of the alleged wrongful conduct whereby she was injured, if a partial or total disability resulting from such injury is reasonably certain to continue for any period of time in the future, the person, nevertheless, could suffer pecuniary loss, then, from the disability.

If, under these instructions, you should find that the plaintiff is entitled to a verdict, you will consider not only the elements of damage heretofore mentioned, but you will also award her such sum as will compensate her reasonably for the pain, discomfort, fears, anxiety and other mental and emotional distress, if any, that have been suffered by her, and which proximately result from the injury in question, and for such like detriment, if any, as she is reasonably certain to suffer in the future from the same cause. The law does not prescribe any definite standard by which to compensate an injured person for pain and suffering, nor does it require that any witness should have expressed an opinion as to the amount of damages that would compensate for such an injury. The law does require, however, that when making an award for pain and suffering, the jury shall exercise its authority with calm and reasonable judgment and common sense, and that the damages shall be just

and reasonable in the light of the evidence, and shall not exceed, as I say, in any event, the [464] amount prayed for in the complaint.

Now, during the course of the trial, ladies and gentlemen of the jury, I occasionally, I believe, asked some questions. Now, I did that in order just to bring out facts that I did not think at that time had been fully covered in the testimony. Under the law, under the federal law, I, the judge, am entitled to comment on the evidence to you. In other words, I could tell you what I think the evidence establishes or proves, so long as I left it up to you finally to determine it. I could express my opinion to you, under the law. That is not so in all courts, but it is so in the federal court. Now, while I have that power and that right, so to speak, of telling you what I think about the case, I don't intend to tell you, and I don't want you to think from any questions that I may have asked during the course of the trial that I have any opinion as to the facts that were developed. I have no opinion on that, and I don't intend and don't want to convey to you any impression that I have an opinion one way or the other as to any of the facts of the case. You are the judges of the facts of the case, and you are more capable of deciding those facts than I am, surely, and I recognize that, and I accept it, and, well, I am a great believer in the jury system, just let me say that; that's your job, and I'll do my job and you do your job, and I'll be responsible for mine, but you have to be responsible for yours. [465]

That's the way I feel about any case that is presented here, so put out of your mind any idea that you may have gotten from any expression that I may have made, any question that I may have asked, any ruling that I may have made upon the offer of evidence. None of those things are to, in any way, be considered by you as any indication of how I feel in the matter. You are the judges of the facts of the case under the law as I give it to you.

Now, upon retiring to your jury room, you will select one of your number to act as foreman, and the foreman will preside over your deliberations and be your spokesman in court.

Forms of verdict have been prepared for your use. The one form is—in the event that under these instructions and the facts of the case, as you determine them, if your verdict were for the plaintiff, the form provides, after stating the title of the court and the cause, "We, the jury, in the above-entitled action, find in favor of the plaintiff and against the defendant, and assess plaintiff's damage at blank. Dated this blank day of April, 1959." Now, if that is your verdict, if your verdict is in favor of the plaintiff, the foreman will fill in the blank amount of money damages, fill in the date, and sign his name as foreman, and then you will return into court.

On the other hand, if your verdict under the evidence and [466] these instructions is in favor of the defendant, he will sign this form of verdict,

which, after stating the title of the court and the cause, provides: "Verdict, We, the Jury, in the above-entitled action, find our verdict in favor of the defendant. Dated this blank day of April, 1959, blank, Foreman." If that is your verdict in favor of the defendant, the foreman will fill in the date and sign his name as foreman and return that verdict into court.

I think it is proper to add finally this caution to you that nothing said in these instructions, and nothing in the forms of the verdict or the order in which I read them or anything about this case at all is to suggest to you or to convey to you in any way or manner any intimation of what verdict I think you should find. That is your exclusive duty and responsibility, too. You have a sworn duty here to act as judges of the facts of this case, and exercise that duty with fairness and with common sense.

Are there any objections or exceptions——

Mr. Erickson: None for the plaintiff.

Mr. Poore: None for the defendant.

The Court: Very well. Have the bailiffs been sworn?

The Clerk: No, your Honor.

The Court: Very well, come forward.

(Bailiffs sworn.)

The Court: I might say, ladies and gentlemen of the jury, [467] if, in the course of your deliberations, you want to communicate with me about any matter, the foreman can write a note and give it to the bailiff, who will deliver it to me. Don't send

any messages by word of mouth. Write out any note you want to send to me.

I might also say that your verdict in this case must be unanimous. In the federal courts, all verdicts must be unanimous. That means that each one of you must agree to the verdict returned. You cannot arrive at a verdict until there are 12 of you agreed upon that verdict.

Is there anything further?

Mr. Erickson: Nothing further, your Honor.

Mr. Poore: Nothing further, your Honor.

The Court: Very well. Now, I have got one more suggestion to you. I am like the lawyers, just one more word. It is just about noon time. Now, if I were you, I would go out and elect a foreman of your jury, and then tell the Marshal that you want to go eat.

Proceed at this determination calmly, don't rush into it. Go eat lunch and then come back and go to work.

The Court will stand in recess awaiting the return of the verdict.

(Thereupon, at 11:50 a.m. April 20, 1959, the jury retired to consider its verdict. Thereafter, at 3:50 o'clock p.m., the same day, the jury returned into Court and the [468] following proceedings were had:)

The Court: Ladies and gentlemen of the jury, I received a note from the bailiff which reads as follows: "According to the law, what is negligence or a negligent act, written instructions of judge?"

Now, let me say first that under the federal system the jury is not given and is not permitted to have any written instructions of the law, but I may answer your question this way by saying that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or, it is the doing what such a person under the existing circumstances would not have done.

In that connection, and with reference to this case, you are instructed that a store owner, such as Safeway, the defendant here in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store, unless he is negligent in the materials he uses for such treatment, or the manner of applying them, or the creation of a dangerously slippery condition, so that thereafter it is not reasonably safe for its intended use by the customers, for people to walk on.

Further, the fact that a store floor is polished or slick does not of itself establish that the store owner is [469] negligent in his choice or application of the floor dressing, or that it is dangerous to the public. Storekeepers are under the duty to keep the floors of their premises reasonably safe for the business invitees, for the patrons that come into the store and who must pass over the floor. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which is superior to the duty to use ordinary prudence and caution to avoid injury to those who do

come upon his premises by invitation, the patrons of the store. If a storekeeper has a floor waxed or polished, it must be done in such a manner that it remains reasonably safe for his invitees.

Now, does that answer your question? Very well. I hope that the way I talked you understood me. I have had a little dental work done since we met earlier today, and the novocain is still there.

You will go back with the Marshal, then, to your jury room and continue with your deliberations, and Court will stand in recess awaiting the return of the jury.

[Endorsed]: Filed September 28, 1959. [470]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE OF TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 33 pages numbered consecutively from 1 to 33, inclusive, together with the Transcript of Evidence, is a full, true and correct Transcript consisting of the original papers designated by the parties, to wit: Complaint, Petition for Removal, Notice of Removal, Bond on Re-

moval, Answer, Verdict, Judgment, Defendant's Motion for Judgment in Accordance With the Motion for a Directed Verdict or for a New Trial, Court's Order of July 1, 1959, Overruling and Denying Defendant's Alternative Motions for Judgment N.O.V. or for a New Trial, Notice of Appeal, Supersedeas Bond, Order Extending Time for Filing Record and Docketing Appeal, and this Designation, as required by rule as the Record on Appeal in Case No. 690, Mildred Murphy vs. Safeway Stores, Inc., as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that as part of Record on Appeal, Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8 and Defendant's Exhibits Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 38, 39 all of which said Exhibits were received in evidence at the trial of said case.

Witness my hand and the seal of said District Court at Butte, Montana, this .... day of October, 1959.

[Seal] DEAN O. WOOD,
Clerk;

By /s/ D. F. HOLLAND,
Deputy Clerk.

[Endorsed]: No. 16649. United States Court of Appeals for the Ninth Circuit. Safeway Stores, Incorporated, Appellant, vs. Mildred Murphy, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: October 21, 1959.

Docketed: October 26, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16649

MILDRED MURPHY,

Plaintiff and Respondent,

vs.

SAFEWAY STORES, INC.,

Defendant and Appellant.

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in refusing to grant defendant's Motion for Directed Verdict made at the close of plaintiff's case in chief.

2. The Court erred in refusing to grant defendant's Motion for Directed Verdict made at the close of all the evidence.

3. The Court erred in refusing to grant Defendant's alternative Motion for Judgment in Accordance with Motion for Directed Verdict or for New Trial.

/s/ JAMES A. POORE, JR.,

/s/ ROBERT A. POORE,

/s/ URBAN L. ROTH,

Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed October 28, 1959.

No. 16,649

IN THE

United States Court of Appeals

For the Ninth Circuit

SAFEWAY STORES, INC.,
Appellant and Defendant,

-vs-

MILDRED MURPHY,
Appellee and Plaintiff.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

APPELLANT'S BRIEF

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Filed February....., 1960

.....Clerk

McKee Printing Co. Butte, Montana

No. 16,649

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

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-vs-

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SUBJECT INDEX

TABLE OF CASES, STATUTES AND TEXTS

CASES

TABLE OF CASES, STATUTES AND TEXTS—
Continued

TABLE OF CASES, STATUTES AND TEXTS—
Continued

TABLE OF CASES, STATUTES AND TEXTS—
Continued

TABLE OF CASES, STATUTES AND TEXTS—
Continued

STATUTES

TREATISES

No. 16,649

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

SAFEWAY STORES, INC.,
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Appellee and Plaintiff.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

APPELLANT'S BRIEF

STATEMENT OF THE PLEADINGS AND FACTS AS TO JURISDICTION

Plaintiff's complaint was filed in the Montana District Court and was removed to the Federal District Court upon the grounds of diversity of citizenship and amount in controversy exceeding $10,000.00. (R. 5.)

Title 28, Section 1332, U. S. C. A.

The pleading showing the existence of diversity of citizenship is the defendant's Petition for Removal which was included in the Record on Appeal (R. 410) but was

not designated for printing by either party and is included in this brief as Appendix A.

The Circuit Court has jurisdiction to review the final decision of the district trial court overruling defendant's alternative motions for Judgment n.o.v. or for a New Trial. (R. 11.)

Title 28, Section 1291, U. S. C. A.

STATEMENT OF THE CASE

This is a personal injury case arising out of the plaintiff's fall in defendant's store on June 24, 1958, where she had gone to shop. The case was tried to a jury and a verdict of $36,500.00 rendered for the plaintiff. The defendant moved for a directed verdict at the close of the plaintiff's case in chief which was tried on the theory that res ipsa loquitur was relevant, and the court took the same under advisement. The defendant then put on its defense and the plaintiff her rebuttal; and at the close of all of the evidence the defendant moved again for a directed verdict which likewise was taken under advisement. The jury was instructed, and no objections were made by either party to these instructions. The jury returned the aforementioned verdict for the plaintiff, and defendant moved alternatively for a judgment n.o.v. or for a new trial upon the same grounds, as to the judgment, which it had urged in its motions for directed verdicts, and, as to the new trial, that the verdict was excessive.

By its order of July 1, 1959, (R. 13), the court denied all of defendant's motions and ruled that under the law of a split of authority in the California district courts,

as followed, as to the faction adopted by the trial court, by the Supreme Court of Oklahoma, there was sufficient proof of the existence of a dangerously slippery floor condition at the time and place of the accident to support the jury's finding of negligence. The trial court held in this diversity case, and irrespective of the Rules of Decision Act and *Erie -vs- Tompkins*, that these three California district court cases and the Oklahoma case had, by virtue of the giving of certain instructions, become the "law of the case" and "that *under such law* there is sufficient evidence in this case to support the jury's finding of negligence on the part of defendant". (R. 13) (Emphasis supplied.)

This appeal was prosecuted in due course from that final ruling of the trial court, and presents the following:

QUESTIONS INVOLVED

(1) Where the doctrine of *Erie -vs- Tompkins* is controlling as here in this Montana, diversity-of-citizenship case; and where, as here, the instructions as tendered and given were based, as they should and had to be, on Montana law as supplemented by general law and the weight of authority where Montana courts have not spoken, is it not then error for a trial court after verdict and judgment and at a time when it is ruling on defendant's alternative motions for judgment n.o.v. or for a new trial, to abandon the mandate of *Erie -vs- Tompkins* and the substantive law of Montana and weight of authority generally and weigh the sufficiency of the evidence on the crucial issue of any proof of a dangerously slippery floor condition, at the time and place of the accident, under

one line of a split of California district court cases as followed by an Oklahoma Supreme Court case?

(2) Where basic instructions are tendered by the parties and are wholly consonant with substantive Montana law and the weight of authority generally, (as they must be in this federal court, diversity-of-citizenship case), is there any reason why it should be "apparent" (R. 13) to a party upon the amendment of its tendered instruction that the interpretive law of the case was thereby being shifted by the court from the weight of case law authority across the land to one fractional line of California inferior court cases as followed by an Oklahoma Supreme Court case—especially when the amendment itself correctly states the substantive law of Montana and the weight of authority generally?

(3) Does a federal trial court in a Montana, diversity-of-citizenship case have any power or authority for any reason whatsoever to abandon the rule of the Rules of Decision Act as construed by the case of *Erie -vs- Tompkins* and adopt a rule as to quantum of proof in a negligence case not representative either of Montana law or the weight of authority across the country?

(4) Where, as in this case, the only proof of the existence of a dangerously slippery condition on an asphalt tile floor which had been washed and waxed the previous night was the plaintiff's fall itself and her description of the floor as "shiny" and "shinier than she had ever seen it before", does not the weight of case law authority, which is applicable in absence of a Montana case in point, hold that there has been a failure of proof of the existence of a dangerously slippery condition entitling

the defendant to judgment, n.o.v.—especially when, as here, there was the undisputed, positive testimony of four witnesses, who went immediately to where the plaintiff had fallen, that the floor was not slippery; that although they inspected the floor in the area of the plaintiff's fall, they found no foreign substance, accumulation or liquid and saw no slide or skid marks; and where, as here, there was no mark or blotch on the plaintiff's clothing, and although the floor was not changed in any way after her accident, no one of the approximately 550 people in the store that same day experienced any slip or slide or fall or reported any slippery condition?

(5) Where a plaintiff is awarded $36,500.00 for injuries received in a slip and fall case where she was dazed by the fall but not rendered unconscious; was never hospitalized; had doctor bills of approximately $30.00, X-ray costs of $110.00, drug bills of less than $10.00, pleaded loss of wages of about $3,000.00 and totaling as to such special damages the sum of $3,150.00; and in her pleadings she assessed her general damages at $10,000.00, and at trial put in no proof whatsoever as to life expectancy or mortality tables or present worth of future wages from which the jury could lawfully and reasonably estimate damages for loss of future earnings, is not such a verdict of $36,500 which includes $20,851.50 of unproven loss of future wages, grossly excessive and not justified by the evidence and so entitling the defendant to a new trial and a fair, impartial and lawful assessment of damages?

(6) Under the facts of this case, as alluded to in the foregoing Questions Involved, where the clear weight of

the evidence wholly fails to support the verdict or judgment, do not the ends of justice require a new trial if, for some reason, judgment is not entered for the defendant?

MANNER IN WHICH THE QUESTIONS INVOLVED WERE RAISED

The first four Questions Involved were raised by the following portion of the court's order denying defendant's motion for judgment n.o.v. which had challenged the sufficiency of the evidence to prove the existence of a dangerously slippery condition at the time and place of the accident in question and by the court's predicating such denial, not upon substantive Montana law as supplemented by the weight of general case law authority, *but rather* upon the rules announced by one fraction of a split of California district court authority, to-wit:

> "It is Therefore Ordered and this does order that the defendant's motion for judgment in accordance with motion for directed verdict or for new trial be and the same hereby is denied in its entirety.
>
> *Sufficiency of Evidence*
>
> By the giving of plaintiff's instruction No. 8 to the effect that the right of the proprietor to wax a floor is not superior to his duty to use care and caution to avoid injury to his patrons, and by the amendment of defendant's Instruction No. 12 by the insertion of the phrase 'or the creation of a dangerously slippery condition', so that the instruction read 'a store owner * * * may treat his floor with wax * * * unless he is negligent in the materials he uses for such treatment or the manner of applying them or the creation of a dangerously slippery condition * * *,' it became apparent the Court was adopting the law an-

nounced in the cases of Nicola vs. Pacific Gas & Electric Co., (Cal.) 123 P 2d 529; Cagle vs. Bakersfield Medical Group, (Cal.) 241 P 2d 1013; Baker vs. Mannings, Inc., (Cal.) 265 P 2d 96; and Chase vs. Perry, (Okl.) 326 P 2d 809. Plaintiff's instruction No. 8, and defendant's instruction No. 12, as amended, were given without objection and thus the law announced in the foregoing cases became the law of this case. The Court is of the opinion that under such law there is sufficient evidence in this case to support the jury's finding of negligence on the part of defendant." (R. 13.)

The fifth and sixth Questions Involved were raised by defendant's Motion for a New Trial which was made after judgment pursuant to Rule 50, Federal Rules of Civil Procedure, and was coupled with the motion for judgment n.o.v.

SPECIFICATIONS OF ERROR

(1) The court erred in not ascertaining and applying, at all times during the trial of the case, and particularly at the time of reserving and then ruling on defendant's motions for directed verdicts and judgment n.o.v., the substantive law of Montana as supplemented, where silent, by the weight of case-law authority across the nation.

(2) After the law of the case had been determined by the adoption and giving without objection of the instructions which expressed, as they had to under the Rules of Decision Act and *Erie -vs- Tompkins,* the substantive law of Montana as supplemented, where silent, by the weight of case-law authority across the nation, the trial court erred in then abandoning such substantive Montana and general law and seizing upon a narrow line of minor-

ity rule cases as the basic standard against which to weigh defendant's challenge that there had been no proof of a breach of duty and that plaintiff had not proved a prima facie case.

(3) The court erred in not granting defendant's motion for judgment, n.o.v.

(4) The court erred in not granting defendant's motion for a new trial.

ARGUMENT

Summary of Argument

Defendant's motions for directed verdict and judgment n.o.v. challenged the sufficiency of the evidence to prove a prima facie case and the existence of a dangerously slippery floor condition at the time and place of the accident. Defendant's other basic challenge was to the excessive verdict. The record is therefore divided into testimony as to the negligence issue and testimony as to damages.

Because the Circuit Court will doubtless want to refer again and again to the evidence as to the facts of the accident and the condition of the floor, an Index and Summary of Negligence Issue Testimony most favorable to the plaintiff has been affixed as Appendix B commencing at page 71.

The argument as to the First Specification of Error, at pages 10 to 16 establishes the subsistingly pervading rule of the Rules of Decision Act as construed by *Erie -vs- Tompkins*.

In the Second Specification of Error, which is argued at pages 17 to 23 of the brief, the appellant establishes

that although the law of the case, as established by the instructions in question which were given without objection, followed the mandate of *Erie -vs- Tompkins* and set forth the substantive law of Montana, as supplemented where silent by the weight of case law authority across the country, the court erroneously departed from such law of the case when thereafter it ruled (R. 13) upon defendant's motion for judgment n.o.v. in that the court seized as "the law of the case" three California Circuit Court decisions representing one side of a split of authority in that jurisdiction and an Oklahoma case following such minority rule.

In its argument as to the Third Specification of Error, at pages 23 to 52 the appellant points out the absence of any proof of the existence of a dangerously slippery condition at the time and place of the accident and shows the errors in the court's analysis of the proof on the negligence issue. Then by applying the facts as viewed most favorably to the plaintiff to the majority rule, which is controlling in this case, the appellant establishes that its motion for judgment n.o.v. should have been granted.

The final portion of the brief, commencing at page 52, deals with the grossly excessive verdict under the facts proved and the applicable law and establishes that the trial court erred in not granting defendant's Motion for a New Trial.

Specification of Error I

The Trial Court Erred in Not Ascertaining and Applying at All Times During the Trial of the Case, and Particularly at the Times of Reserving and Then Ruling on Defendant's Motions for Directed Verdicts and Judgment N.O.V., the Substantive Law of Montana as Supplemented, Where Silent, By the Weight of Case-Law Authority Across the Nation as Required By the Mandate of *Erie -vs- Tompkins*.

By way of preface to the court's opinion holding the evidence sufficient to sustain the verdict and judgment, the court said:

> "By the giving of plaintiff's instruction No. 8 to the effect that the right of the proprietor to wax a floor is not superior to his duty to use care and caution to avoid injury to his patrons, and by the amendment of defendant's Instruction No. 12 by the insertion of the phrase 'or the creation of a dangerously slippery condition,' so that the instruction read 'a store owner * * * may treat his floor with wax * * * unless he is negligent in the materials he uses for such treatment or the manner of applying them or the creation of a dangerously slippery condition * * *,' it became apparent the Court was adopting the law announced in the cases of Nicola vs. Pacific Gas & Electric Co., (Cal.) 123 P 2d 529; Cagle vs. Bakersfield Medical Group, (Cal.) 241 P 2d 1013; Baker vs. Mannings, Inc., (Cal.) 265 P 2d 96; and Chase vs. Perry, (Okl.) 326 P 2d 809. Plaintiff's instruction No. 8, and defendant's instruction No. 12, as amended, were given without objection, and thus *the law announced in the foregoing cases became the law of this case. The Court is of the opinion that under such law there is sufficient evidence in this case to support the jury's finding of negligence on the part of the defendant.*" (Emphasis supplied.) (R. 13.)

This was error! The trial court had no power or authority to make any law other than the substantive law

of Montana as supplemented, where silent, by the weight of authority of general case-law across the country, the "Law of the Case"! And, particularly is this so when, as established by the argument and citations in the next section of this brief under Specification of Error II, these basic instructions on standard of care as tendered and amended and given by the court *did conform* to the mandate of *Erie -vs- Tompkins* and were the substantive law of Montana as supplemented by general case law throughout the country!

Federal jurisdiction in this case is based upon the amount in controversy exceeding $10,000.00 and the diversity of citizenship of the parties.

Title 28, Section 1332, U. S. C. A.

The Rules of Decision is controlling.

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

Title 28, U. S. C. A., Section 1652.

The purpose of this section is to make certain that in all matters where the courts are exercising jurisdiction, as here, by virtue of diversity of citizenship, the Federal Courts will apply as their rules of decision the law of the State, unwritten as well as written.

Erie R. Co. -vs- Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1937);

West -vs- American Telephone & Telegraph Co., 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139 (1940);

14 Am. Jur. 307, "Courts" Sec. 94.

The rule of *Erie -vs- Tompkins* pervades all substantive law portions of the case at all times during the trial and even on appeal. The trial court and the Court of Appeals must continuously seek for and be mindful of the substantive law of the state forum. Thus, if while this appeal is pending, the Montana Supreme Court should hand down a decision as to standard of care, burden of proof, and generally the quantum of proof necessary to prove a prima facie case in one of these unexplained, slip-and-fall situations, this Circuit Court would have to adopt that Montana decision as being controlling—irrespective of the fact that it conflicted with the trial court's ruling and irrespective of the fact that at the time it was made, the trial court appeared to be soundly applying Montana law.

> *Virginia Vandenbark -vs- Owens-Illinois Glass Company*, 311 U.S. 538, 85 L. Ed. 327, 61 S. Ct. 347 (1940).

While there is a substantial body of Montana law on tripping and slip-and-fall cases, as outlined hereinafter at page 18, there is no Montana case similar to this where the fall was unexplained and there was no proof that the floor was dangerously slippery at the time and place of the accident. The rule then under the *Erie -vs- Tompkins* mandate is to either apply the majority rule as announced by the weight of case-law authority across the country or to endeavor to ascertain what the Montana Supreme Court would do if this case were before it. Probably both rules are one and the same, and under Montana law they certainly are; for in the leading Montana case of *Chichas -vs- Foley Bros. Grocery Co.*, 83

Mont. 575, 581, 236 Pac. 361, 362 (1925) which involved an invitee's falling down an unguarded elevator shaft in a store, the court said:

> "The *general rule* deducible from the authorities, *and of which we voice approval*, is clearly stated in 20 R.C.L. p. 66, as follows: 'A merchant or shopkeeper, who maintains warerooms for the exhibition and sale of goods, impliedly solicits patronage, and one who accepts the invitation to enter is not a trespasser nor a mere licensee, but is rightfully on the premises by invitation, and entitled to all the rights of invited persons. The floors and passageways of the building MUST BE KEPT IN A REASONABLY SAFE CONDITION, and the same is true of stairways, elevators, doors, windows, and other places and appliances." (Emphasis supplied.)

As will hereinafter appear under the argument of the Second Specification of Error, the two instructions seized upon by the court as having effected a change in the *Erie -vs- Tompkins* rule dealt with basic law of the standard of the defendant's duty of care to its patrons. And the *Chichas* case specifically considered that issue in Montana and adopted the "general rule" of a duty to maintain *reasonably safe* premises. It is therefore apparent that the Federal Court in this Montana diversity case must apply the *general rule* in ascertaining the finer points of the rule of standard of care and proof of its violation in situations where the Montana court has not spoken.

Jackson -vs- Flohr, (CA 9th 1955) 227 F. (2d) 607.

Beck -vs- F. W. Woolworth Co., (D.C. Iowa, 1953) 111 F. Supp. 824.

Federal Court warranted in assuming that highest court of state would follow generally recognized rule and such Federal Court would not be justified

in assuming that such state court would follow a single decision from another jurisdiction.

Werthan Bag. Corp. -vs- Agnew, (C.A. Tenn. 1953) 202 F. (2d) 119.

Federal Court to look to the common law as declared by the state courts of the country.

Hudson -vs- American Oil Co., (D.C. Va. 1957) 152 F. Supp. 757.

Federal Court to assume that weight of authority will prevail in the state.

Fair -vs- U. S., (C.A. Tex. 1956) 234 F. (2d) 288.

Federal Court to look to "general law".

U. S. -vs- Jones, (C.A. Kan. 1956) 228 F. (2d) 84.

Federal Court to look to "weight of authority".

AND THE FEDERAL TRIAL COURT IS NEVER AT LIBERTY TO STOP SEEKING FOR MONTANA LAW AND THE GENERAL RULE IN ABSENCE OF SUCH LAW! IT CANNOT PROPERLY ADOPT AND SEIZE UPON THE LAW OF SOME NON-FORUM JURISDICTION AT CONFLICT WITH THE GENERAL RULE—NO MATTER HOW PERSUASIVE AND ENLIGHTENED SUCH RULE OF LAW MAY APPEAR—AND MAKE THAT THE LAW OF THE CASE IN MONTANA!

Werthan Bag Corp. -vs- Agnew, (C.A. Tenn. 1953) 202 F. (2d) 119.

In the *Werthan* case the Federal Court sitting in Arkansas had jurisdiction, as here, by virtue of the amount in controversy and diversity of citizenship. The question was whether the woman plaintiff had a cause

of action for loss of services and companionship by virtue of the defendant's having negligently injured her husband. *IF* the Federal Court had been the Supreme Court of Arkansas, or IF it had had jurisdiction or authority to announce the rule it favored, it would have adopted a rule announced by the Court of Appeals for the District of Columbia. HOWEVER, by virtue of the Rules of Decision Act and *Erie -vs- Tompkins,* supra, it was bound to seek for and apply the law of Arkansas; and in absence of expression of that law by Arkansas' highest tribunal, to ascertain and apply the rule of the weight of authority, i. e., the general rule.

> "We are much impressed by the reasoning of the Court of Appeals for the District of Columbia—and were we free to declare the law of Arkansas, whose courts have made no pronouncement on the subject, to be contrary to the overwhelming weight of state court authority, we might well go along with the Court of Appeals for the District of Columbia. BUT WE CONSIDER OURSELVES RESTRICTED IN THIS RESPECT BY THE HIGHEST AUTHORITY." (Citing *Erie -vs- Tompkins* and *West -vs- A.T.&T.*)
>
> "We think these two opinions of the Supreme Court, considered together, reveal *how strongly* the Supreme Court intended to restrict the federal courts in the pronouncement of their own views of the common law when inconsistent with the opinions of the state courts. It would seem that, in the teeth of such intended curtailment, this court would not be privileged to declare the law of Arkansas *to be contrary to the universal law* applied in other states whose courts have spoken upon the subject." (Emphasis supplied.)
>
> *Werthan Bag Corp. -vs- Agnew,* (C.A. Tenn. 1953) 202 F. (2d) 119, 124, 125.

And the rule of the *Werthan* case would be even more pointed where, as here, (and as outlined on pages 43 to 50, post) the rule which the trial court seized upon and made the "law of the case" represents one side of a split of District Court authority in California as followed by a Supreme Court of Oklahoma case! The other line of California cases represented by *Vaughn -vs- Montgomery Ward & Co.,* 95 Cal. App. (2d) 553, 213 P. (2d) 417 (1950) is expressive of the general rule and would never sustain the plaintiff's proofs in this case!

CONCLUSION AS TO FIRST SPECIFICATION OF ERROR

By virtue of the foregoing law and irrespective of what the parties did or did not do, the Federal Court had no jurisdiction or authority on substantive issues of standard of care and proof of breach, i. e., proof of a prima facie case to seek for and apply any law other than the substantive law of Montana as supplemented, where absent, by the weight of authority in other states; and it was error for the Court to seize upon the decisions of two non-Montana jurisdictions representing the minority rule and declare such decisions to be the "law of the case" in direct violation of the *Erie -vs- Tompkins* mandate!

Specification of Error II

After the Law of the Case Had Been Determined By the Adoption and Giving Without Objection of the Instructions Which Expressed, as They Had to Under the Rules of Decision Act and *Erie -vs- Tompkins*, the Substantive Law of Montana as Supplemented, Where Silent, By the Weight of Case-Law Authority Across the Nation, the Trial Court Erred in Then Abandoning Such Substantive Montana and General Law and Seizing Upon a Narrow Line of Minority Rule Cases as the Basic Standard Against Which to Weigh Defendant's Challenge That There Had Been No Proof of Breach of Duty and That Plaintiff Had Not Proved a Prima Facie Case.

The two instructions that the court singled out as making "apparent" (R. 13) the court's conviction that the *Nicola* line of cases had become the "Law of the Case" are as follows:

Plaintiff's Tendered Instruction No. 8 (R. 398)

> "Storekeepers are under the duty to keep the floors of their premises *reasonably safe,* as I say, for the people who are invited to pass over them. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which is superior to the right, or to the duty to use ordinary prudence and caution to avoid injury to those who come upon the premises. If a storekeeper has a floor waxed or polished, it must be done in such a manner that it remains *reasonably safe* for the invitee, for the people that the store owner, in this case, Safeway, invites into the store to do business." (Emphasis supplied.)

BUT THIS INSTRUCTION IS WHOLLY EXPRESSIVE OF AND CONSONANT WITH MONTANA LAW SO FAR AS THE COURTS OF THAT

STATE HAVE SPOKEN. It is merely a statement of the established Montana law on the standard of duty of care owed by a business premises operator to an invitee.

> "the Mulvaney Realty Company owed to plaintiff the legal duty to exercise reasonable care for her safety, and maintain and keep said premises and facilities in a *reasonably safe* condition." (Emphasis supplied.)
>
> "*Ahlquist -vs- Mulvaney Realty Co.,* 116 Mont. 6, 30, 152 P. (2d) 137, 148 (1944). (Plaintiff, an invitee in a bus depot slipped and fell in ladies room.)
>
> "The general rule deducible from the authorities, and of which we voice approval, is clearly stated in 20 R. C. L. p. 66, as follows: 'A merchant or shopkeeper, who maintains warerooms for the exhibition and sale of goods, impliedly solicits patronage, and one who accepts the invitation to enter is not a trespasser nor a mere licensee, but is rightfully on the premises by invitation, and entitled to all the rights of invited persons. The floors and passageways of the building must be kept in a *reasonably safe* condition, and the same is true of stairways, elevators, doors, windows, and other places and appliances. (Emphasis supplied.)
>
> *Chichas -vs- Foley Bros. Grocery Co.,* 83 Mont. 575, 581, 236 Pac. 361, 362 (1925).
>
> (Invitee in general store fell down unguarded elevator shaft.)

See also:

> *McCartan -vs- Park Butte Theater Co.,* 103 Mont. 342, 62 Pac. (2d) 338 (1936).
>
> (Patron tripped over protruding theater step.)
>
> *Rossburg -vs- Montgomery Ward & Co., et al.* 110 Mont. 154, 99 P. (2d) 979 (1940).
>
> (Invitee slipped on accumulated oil on floor.)

Myles -vs- Helena Motors, 113 Mont. 92, 121 Pac. (2d) 549 (1942).
(Invitee in garage walked into car hoist.)

Montague -vs- Hanson, 38 Mont. 376, 99 Pac. 1063 (1908).
(Store patron falls down unguarded cellarway.)

There is no question but that the instruction is the general Montana rule and was not objectionable under *Erie -vs- Tompkins* or for any other reason. There is no reason why the giving of that instruction should put any party on notice that the rule of *Erie -vs- Tompkins* was being abandoned and the court was about to adopt a narrow, minority rule as the law of the case!

That portion of the instruction which limits the proprietor's waxing rights to one that maintains a reasonably safe floor is wholly consistent with the rest of the instruction and with Montana law. It is doubtless what Montana courts would hold if called to pass on the question and represents the general rule. Certainly the defendant at no time maintained that it had the right to wax its floors irrespective of the creation of a dangerously slippery condition. Such a contention would fly in the teeth of the Montana rule, supra.

The second instruction specified by the court as having given notice of the *Nicola* line having become the law of this case picks up that same issue of standard of duty of care but carries it further into the issue of right to wax:

> "The fact that a floor is polished or slick does not of itself establish that the store owner is negligent in his choice or application of the floor dressing, or that it is dangerous to the public, or to those invited to use it. A store owner, such as Safeway

> in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is negligent in the materials he uses for the treatment or the manner of applying them, OR THE CREATION OF A DANGEROUSLY SLIPPERY CONDITION, so that thereafter the floor is not reasonably safe for its intended use by the customers in the store."
>
> Defendant's Tendered Instruction 12, as Amended (R. 398, 399), with Amendment showing in capitals.

The trial court has stated in its Order denying defendant's alternative motions (R. 13) that by the giving of plaintiff's Instruction No. 8 and by the amendment of defendant's Instruction No. 12, it "became apparent" that the court was adopting the *Nicola* line of cases as the law of this case. (R. 13.)

With *or without* the amendment, the instruction correctly states the majority rule and doubtless would find approval with the Montana Supreme Court in view of that State's basic law that the premises must be *reasonably safe* for the invitees. It is not the majority rule, and defendant has never contended, that a proprietor has any right to create a dangerously slippery condition. As the instruction read before amendment, the premises had to be "reasonably safe", and they cannot be "reasonably safe" if they are dangerously slippery. If any inference were to arise from this instruction, it should be that the general rule was again being announced. For the last sentence is an almost verbatim quotation from the case of *Dixon -vs- Hart,* 344 Ill. Ap. 432, 101 NE (2d) 282, 284 (1951). There, after reviewing cases from many

jurisdictions and citing ALR annotations on the point, the court said:

> "In our view, the simple legal proposition (that) crystalizes from the many factual situations giving rise to suits of this nature may be stated thusly: A store owner may treat his floors with wax or oil or other substance in the customary manner without incurring liability unless he is shown to be negligent in the materials he uses or in the manner of applying them."

But, as the *Dixon* court hastened to point out, and as the instruction both as originally tendered and as amended provided, such right to treat the floors was subject to the basic requirement that after such treatment the floors remain reasonably safe for their intended use. The *Dixon* language on this point at page 284 of 101 NE (2d) was as follows:

> "We agree with the Supreme Court of Missouri in the last cited case that the use of an unusual amount or kind of wax on a floor which causes it to be so highly polished *as to be dangerous for use* by the public would constitute actionable negligence; *but* we hold that such dangerous condition must be shown by competent, objective evidence." (Emphasis supplied.)

But, irrespective of the fact that this instruction represented the majority view across the country (as the *Dixon* court determined from its study), and irrespective of its being wholly consonant with basic Montana law, the court ruled that by the making of an amendment which in no-wise changed the basic intendments of the instruction, the court was freed of the majority rule burdens and in a position to adopt and make as the "law of the case" a minority ruling which was attractive to the court but

wholly at odds with case law across the country.

The *true law of the case,* which was established by the giving of the instruction as amended without objection, was the majority rule; and it was error for the court to abandon it; and it was further error for the court to make no pronouncement of such abandonment so that objection could be made, but rather to regard such abandonment as apparent.

CONCLUSION AS TO SPECIFICATION OF ERROR II

Appellant respectfully submits that the two Instructions as given and amended state basic Montana law, and the law generally as applied to the more specialized issue of the standard of due care in the treatment of floors. There is certainly nothing to justify the court's statement that by the giving and amendment of the same, "it *became apparent* the Court was adopting the law announced in the cases of *Nicola*" et seq. (R. 13.) If any aberration from the *Erie -vs- Tompkins* mandate can be authorized by virtue of the giving or amendment of instructions, or otherwise, (which appellant denies in its First Specification of Error, *supra*), then it certainly should take something more concrete than the adoption of sound general rules of law to put on notice a party who is urging the applicability of the general rule so that he can object and get the rules and the record straightened out.

It was error for the court to seize the minority *Nicola* line rule as the basic standard against which to weigh defendant's challenge that there had been no proof of breach of duty and that the plaintiff had not proved a

prima facie case by competent proof of the existence of a dangerously slippery condition at the time and place of the accident; and it was not and should not have been apparent to the Appellant that such error was being committed.

Specification of Error III

The Court Erred in Not Granting Defendant's Motion for Judgment N.O.V.

A. Introduction

a) Majority Rule Defined

There has been frequent reference throughout this brief to the "majority rule" which is in conflict with the rule of the *Cagle* and *Chase* cases (R. 13), frequently referred to herein as *Nicola* et. al., and which the trial court held had become the law of this case.

The "rule" that is being referred to is one of quantum of evidence necessary to prove a prima facie case. It is the rule by which the sufficiency of the evidence is legally weighed. The trial court erroneously adopted *not* the majority rule but the strict minority rule of *Cagle* et al, (R. 13) in applying defendant's challenge for judgment n.o.v. Phrasing the problem in terms of the end result—before the *Cagle* tribunal plaintiff's judgment would probably be permitted to stand; but before the great majority of courts across this country, *it would not.*

The majority rule, as established by the numerous decisions from the various jurisdictions hereinafter cited, commencing at page 35, is that the existence of a dangerously slippery floor condition at the time and place of the accident must be proved by substantial evidence apart from the happening of the accident itself.

It will be noted as these authorities are analyzed that the presence *or absence* of a number of factors are considered in determining whether substantial evidence of the dangerously slippery condition has been adduced. As the factors accumulate, one way or the other, the courts recognize the sufficiency or insufficiency of the proof. If all that the evidence adds up to, as here and in the *Cagle* case relied upon by the court, (R. 13) is that the accident occurred and the plaintiff described the floor as very shiny, then the great majority of the courts would say that no substantial evidence of a dangerously slippery condition has been adduced and that the doctrine of res ipsa loquitur is being relied on.

In approximate order of the weight given them by the courts, the factors are:

1. Accumulation of slippery, foreign substance where accident occurred.
   a) Soiled clothing and wax scrapings on shoes showing such foreign substance.
   b) Skid or slide marks.
2. Other slips or falls in that area near that time.
3. Characterization by witness who examined the floor that it was of a particular degree of slipperiness.

Since res ipsa loquitur is not applicable according to the great weight of authorities, there is no reason in these slip and fall cases that the plaintiff should not have to prove the dangerously slippery condition of the floor at the time and place of the accident and apart from the happening of the accident itself. This is what the majority of the cases insist upon!

If the factors of proof of the particular case are sufficient from the foregoing to have established the existence of this dangerously slippery condition, then the trier of fact is entitled to consider *how* the hazardous condition was created. This is the area where legitimate inference or presumption is available to the trier of the fact. If there has been a recent oiling or waxing and it was excessive oil or wax that had been proved to have made the accident scene dangerously slippery, then the trier of fact can infer negligent application and the proprietor's notice of the condition.

But since the absolute weight of authority permits no inference of negligence (the creation of a dangerously slippery condition) from the waxing or oiling of a floor or from the accident itself, it is the duty of the courts to see that the rationalization process or inference process isn't reversed so that the jury starts first with the graphic evidence of the fall and then infers that since the floor had been waxed it must have been done so negligently so that a dangerously slippery condition was created and proximately caused the fall! In many of the following cases commencing at page 35, the jury found for the plaintiff, i. e., it impliedly found that a dangerously slippery condition had been created by the defendant proximately causing the accident. In each, the court then reviewed the facts *and law*, as represented by the great weight of authority, and held that there was not substantial proof of the existence of a dangerously slippery condition and entered judgment as a matter of such law for the defendant. These unexplained slip-and-fall cases involve temptingly simple presumption situations for the ordinary juror, and judicial supervision is particularly

essential. Furthermore, the necessity for adherence to the well established rules and legal supervision of the trier of fact is especially pertinent and necessary in a case such as this where the plaintiff urged the applicability of res ipsa loquitur in her own case in chief in order to raise a jury question. (R. 182, 183, 191.) Under the overwhelming majority of the courts, and before this trial court if it had not erroneously adopted the *Cagle* rule as the law of the case, the plaintiff's proof here would have been found wholly wanting.

b) Factors of Evidence as to Dangerously Slippery Condition Wholly Absent Here

The complete absence of any evidence of a dangerously slippery floor condition in this case is strikingly apparent from the following:

1. No proof of any foreign or slippery substance on the floor.
2. No proof that the floor surface was slippery, but on the contrary, positive testimony by each of the four witnesses who inspected the floor that it was not slippery. (R. 309, 210, 246, 230.)
3. No other persons slipped or slid in the area although the plaintiff was helped to her feet and the employees who had assisted her remained there for about five minutes. (R. 309.)
4. No customers of the 550-odd that were in the store that day slipped or had any difficulty. (R. 206, 211.)
5. Plaintiff herself didn't describe the floor as slippery—nor did any other person.
6. No slip or slide or skid marks were on the floor indicating slippery foreign substance. (R. 309, 211, 230.)
7. Clothing not stained or soiled. (R. 82.)

The only description which the plaintiff gave of the floor was that it was "very shiny". This, of course, is no evidence of the existence of a dangerously slippery condition.

Stephens -vs- Sears Roebuck & Co., (CA Ind. 1954) 212 F. (2d) 260, 261;

Vinson -vs- Brown, 193 Ore. 113, 237 P. (2d) 501 (1951);

Dixon -vs- Hart, 344 Ill. App. 432, 101 N.E. (2d) 282, 1951);

Rogers -vs- Collier, (Tex. 1949) 223 S.W. (2d) 560;

Osborn -vs- Klaber Bros., 227 Iowa 105, 287 N.W. 252 (1939).

Not only were the standard factors as to evidence of a dangerously slippery condition absent, but on each potential point there was concrete evidence to the contrary. As the cases, commencing hereinafter at page 35, show, there was a complete and total failure of proof of the existence of any dangerously slippery condition at the time and place Miss Murphy fell!

c) Court Permitted Inference of Existence of Dangerously Slippery Condition from Proof of Waxing and from the Happening of Accident Itself.

Controlled by the *Cagle* case reasoning (R. 13), which is shown hereinafter in this brief at page 45 to be faulty and erroneous and not representative of the majority rule, the trial court failed in its review of the testimony on defendant's motion for judgment n.o.v. (R. 14-17), to require substantial proof of the existence of a dangerously slippery floor condition and acquiesced in the jury's

inference of the existence of such a condition from the proof of the waxing of the floors and the proof of the accident.

> "Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn is a question of fact for the jury."
>
> *Blank -vs- Coffin,* 20 Cal. (2d) 457, 461, 126 P. (2d) 868, 870 (1942).

C-1

Build-up of Wax (R. 14)

There is not a single shred of evidence anywhere in the record that any wax whatsoever had built up anywhere in the store when Miss Murphy fell, and more particularly that any had built up at the time and place of her fall! There is not a single shred of evidence that any wax build-up, about which the witnesses were talking, had *ever* resulted in a dangerously slippery condition. There is no evidence that any de-waxing operation was then, at the time of the accident, due or over due. All that the record discloses is that from time to time in the care of the floors there had been some de-waxing (R. 175, 331). And from this the trial court permitted an inference by the jury of the proof of a dangerously slippery condition at the time and place of the accident!

If any logical process whatsoever would permit such a conclusion, and it will not, it certainly would be rebutted by the *proof* that under the workmanship of this mature (R. 320) janitor not only had the floors *not* been negligently maintained but the store had experienced three slip-and-fall cases in 1,050,000 *sales,* and, of these,

only Miss Murphy claimed the accident was Safeway's fault! (R. 185, 184.)

Furthermore, she did not fall in some unusual spot in the store where traffic was light. She fell about mid-aisle in a heavily traveled portion (R. 186) of the store. Mrs. Ledingham, who saw Miss Murphy a fraction of a second after she hit the floor (R. 306), referred to defendant's Picture Exhibit 10 and put Miss Murphy's body on the grease-pencil-arrow with her head at about circled 2. The other witnesses who saw her immediately after the fall place her at about the same place. Referring to defendant's Picture Exhibit D9, and pages 228 and 238 of the record, witness Squires placed her in approximately the same spot. The plaintiff herself testifies she was at the end of the produce counter shown in the pictures (R. 37) on her way to the coffee counter.

The court was permitting an inference of negligence from proof of the mere waxing of the floor and irrespective of the foregoing total absence of proof of any wax accumulation or the creation in some other manner of a dangerously slippery condition. That is not the law!

> "some condition beyond the fact that the floor was waxed and that the plaintiff fell is necessary to a cause of action for negligence in creating or permitting a dangerous condition to exist where people are expected to walk."
>
> *Gaddis -vs- Ladies Literary Club,* 4 Utah (2d) 121, 288 P. (2d) 785, 786 (1955).

> "Neither the fact that plaintiff slipped and fell nor the fact that the floor was waxed, of itself, establishes or permits an inference of negligence."
>
> *Hanson -vs- Lincoln First Federal Savings & Loan Association,* 45 Wash. (2d) 577, 277 P. (2d) 344, 345 (1954).

See also: *Stephens -vs- Sears Roebuck & Co.*, (CA Ind. 1954) 212 F. (2d) 260.

In the total absence of proof that any wax whatsoever had built up at the accident scene, or that it had ever built up in the store so as to create a dangerously slippery condition, there was no room for any inference whatsoever under Montana law as to a built-up wax condition.

> "From one fact found another may be presumed if the presumption is a logical result; but to hold that a fact presumed (that the floors had been allowed to accumulate wax to the point of being dangerously slippery) at once becomes an established fact for the purpose of serving as a basis for a further presumption of inference (that there *was* a dangerous accumulation in the middle of the aisle at the time and place where plaintiff fell) would be to spin out the chain of presumptions into the barest region of conjecture."

Doran -vs- United States Bldg. etc. Assn., 94 Mont. 73, 78, 20 P. (2d) 835, 837 (1933). Sec. 93-1301-4 R.C.M. (1947).

C-2

Method of Waxing (R. 14)

At the same page of the court's opinion (R. 14), it is stated that the jury could have found negligence in the manner of the application of the wax.

Again it is an example of reasoning *from* and inferring negligence *from* the happening of the accident and the waxing. Properly the court should have studied the evidence for proof of the existence of the dangerously slippery condition. If that was found as a proven fact, then it could review the evidence as to how the waxing was

done and permit the inference—if the jury decided to make it—that such dangerously slippery condition had been created by defendant's method of waxing.

But here the court is approving the following jury rationale and in the face of the undisputed remarkable record achieved by this particular method of floor care whereby over a period of years and the attendance at the store of over a million customers only the plaintiff slipped and fell and blamed Safeway! (R. 185.)

a) Janitor Rodoni's method is negligent.
b) At the time and place in question on June 24, 1958 that negligent system created a dangerously slippery condition (irrespective of absolute proof to the contrary.)
c) Such dangerously slippery condition was the proximate cause of Miss Murphy's fall.

That is spinning out the inferences in violation of the *Doran* rule and section 93-1301-4, R.C.M. (1947) and is the very thing that the courts must guard against in unexplained slip and fall cases:

> "*The majority of courts* in the United States hold that the mere application of wax to a floor will not constitute negligence, even though having some tendency to make the floor more slippery. (Citations) *To hold otherwise,* these courts reason, *is to permit the jury to act upon speculation and conjecture* that he slipped on a floor which he deemed to have been made excessively slippery by defendant's application of wax." (Emphasis supplied.)
>
> *Gaddis -vs- Ladies Literary Club,* 4 Utah (2d) 121, 288 P. (2d) 785 (1955).

Furthermore, for the foregoing inference sequence to have any merit, janitor Rodoni would have been creating

a dangerously slippery condition over the whole floor twice each week. For he always did the same work, i. e., the same operation (R. 328). Of course that is fantastic under this record of remarkably safe results!

C-3

Change in Number of Weekly Cleanings (R. 14, 15)

On page 15 of the record the court states in its opinion that the jury could properly find that there had been a build-up of excess wax to the point of creating a dangerously slippery floor condition at the time and place of Miss Murphy's fall from the fact that six months after the accident Mr. Rodoni commenced waxing the entire floor once a week and then on the second night of clean-up, just waxing the fore-part of the store where the traffic was necessarily heaviest.

In the first place, this isn't actually what Mr. Rodoni said he did. He testified that before June of 1958, he sometimes did and sometimes didn't wax the whole store twice a week—depending on the shape the floor was in. (R. 333.) But even if the facts had been as the court recalled them, there is no rational process approved by law that can be gone through which will result in substantial evidence on the issue as to whether a dangerously slippery condition existed at the time and place of the accident. There isn't even any evidence as to why the change was made, unless it was that the difficult economic situation which had developed (R. 79, 80) had resulted in a fall-off of sales and traffic. But in the absence of an iota of evidence that the change was made

in December, 1958, because excessive wax was building up, the court permitted that basic presumption to be made. And from that premise the court permitted the further inferences that such building up of excess wax was also in process in June, 1958; that it had resulted in the build-up of a *dangerously slippery amount* at the time and place of the accident; and finally that that was what caused the plaintiff to slip and fall.

If there had been evidence (which there wasn't) that the change was made because in December, 1958, two complete waxings per week was resulting in a dangerous build-up, still Montana law would not permit the inference sequence. It would not permit the inference by the trier of fact that such build-up situation also obtained back in June of 1958:

> "No presumption is to be inferred from the fact that a condition exists at a particular time that it existed in the past. Presumptions (that a thing proven to exist continues to exist) cannot be reversed. They do not operate backwards." (Parenthetical phrase added.)
>
> *Doran -vs- United States Bldg. etc. Ass'n.*, 94 Mont. 73, 76, 77, 20 P. (2d) 835, 837 (1933).

The trial court even stated in its opinion (R. 15) that by virtue of the argument made by plaintiff's counsel to the jury that the change of mode of operations had arisen six months after the accident *because* of defendant's "discovery" of its own negligence, the jury could consider that *as evidence* that the change did come about to correct a dangerous procedure. Plaintiff's argument was not a whit stronger than the totally blank record, summarized above, upon which it had to be based and was not itself

any evidence whatsoever of any negligent act or omission! OF COURSE, THROUGHOUT THE COURT'S REVIEW OF THE EVIDENCE UNDER DEFENDANT'S CHALLENGE BY WAY OF MOTION FOR JUDGMENT, N.O.V., THE COURT WAS REQUIRED TO REJECT ALL BUT "SUBSTANTIAL EVIDENCE" OF PROOF OF THE EXISTENCE OF A DANGEROUSLY SLIPPERY CONDITION AT THE TIME OF THE ACCIDENT.

2 Barron & Holtzoff 759, sec. 1075.

Also, it should be noted that throughout these ramified inference sequences it was necessary for the court and jury to disregard the undisputed, credible evidence of the four witnesses who hurried to help Miss Murphy and who then and there made an inspection of the floor and found that it was not slippery! It is not the law to ignore such proof.

> "The rule that the trial court may not disregard uncontroverted credible evidence is fundamental. (Citations.)"
>
> *Higby -vs- Hooper*, 124 Mont. 331, 352, 221 P. (2d) 1043, 1053 (1950).

> "We have repeatedly held that uncontradicted credible evidence may not be disregarded."
>
> *Burns-vs- Fisher*, 132 Mont. 26, 34, 313 P. (2d) 1044, 1049 (1957).

C-4

Manner of Fall (R. 16-17)

The court at page 16 of the opinion refers to the manner of the plaintiff's fall and the case of *Allen -vs- Matson Navigation Company*, (CA Cal. 1958) 255 F. (2d) 273.

Neither the trial court in the instant case nor the Court of Appeals in the *Allen* case held that from the manner of fall the existence of a dangerously slippery condition could be inferred. The manner of the fall is indicative that it was a slipping fall rather, for example, than a tripping fall. Of course, it should also be kept in mind that in the *Allen* case there was other substantial evidence of the existence of a dangerously slippery condition, violative of the carrier's duty to use *the utmost care and diligence* for the safe carriage of the passengers. And the difference in standard of care is of fundamental importance.

Osborn -vs- Klaber Bros., 227 Iowa 105, 287 N.W. 252, 253 (1939).

III-B

Cases Illustrating the General Rule

It is the defendant's contention that under the rules of the weight of authority the plaintiff had the burden of proving the existence of a dangerously slippery condition at the time and place of the accident by substantial evidence and aside and apart from the happening of the accident itself and the prior waxing of the floor.

The following cases are authorities for this contention.

In the case of *Dixon -vs- Hart,* 344 Ill. App. 432, 101 N.E. (2d) 282 (1951), upon which defendant's instruction No. 12 (R. 13) was based (this brief supra at page 21) the plaintiff slipped and fell and obtained a jury's verdict and judgment. Defendant's motions for directed verdict and judgment n.o.v. were denied, but on appeal judgment was entered for it. Plaintiff alleged a

dangerously slippery floor condition and set out to prove it. Her fall occurred when her left foot slipped. She inspected the floor by rubbing her hand on it at the place where she was then taken and seated, about 25-30 feet from the site of the fall, and found it "slick". The floor had been waxed three or four weeks before the accident. She noted a dark mark about 1½ feet long where she had fallen and where her foot slipped. The court reviewed the law and held that waxing a floor isn't evidence of negligence, and that a dangerously slippery condition "as shown by competent objective evidence must be shown", and concluded:

> "Nor can we agree with the plaintiff's contention that the mere showing that a floor has been polished together with some evidence of its being 'slick' is at least sufficient to require that the store-owners' liability be weighed by a jury in any case. It is difficult to see how the ends of justice would be served by permitting a jury to speculate and conjecture as to whether the condition of the floor, as shown by such evidence, caused plaintiff to fall. This is especially true in the instant case where a jury's conclusion as to the condition of the floor where plaintiff fell would, of necessity, be based on an unwarranted inference from evidence as to the condition of the defendant's floor '25 or 30 feet' away. Extrinsic evidence of a character more clear and convincing than plaintiff's completely subjective verbal characterization of the floor as 'slick' must be shown before a jury could fairly and intelligently weigh the owner's conduct in the care of his floors and its causal relationship to plaintiff's fall. (Emphasis supplied.)
>
> "We conclude that the plaintiff has not, as a matter of law, on the evidence adduced, established a cause of action—"

Dixon -vs- Hart, 344 Ill. App. 432, 101 N.E. (2d) 282, 283 (1951).

In the case of *Stephens -vs- Sears Roebuck & Co.,* (CA Ind. 1954), 212 F. (2d) 260, the plaintiff fell on a floor that she described as "very slick and shiny". She described her fall as "suddenly I seemed to hit a greasy or slick spot, my feet flew out from under me, and I hit the floor". Plaintiff had a verdict and defendant moved under the federal rules for judgment n.o.v., which was granted and affirmed.

> "It was incumbent on plaintiffs to prove that the defendant was guilty of negligence in maintaining the washroom floor. Counsel for plaintiffs admits that waxing a floor is not negligence *per se.* If the evidence of plaintiffs' witnesses standing alone, is to be considered as sufficient to prove that the floor was waxed, it was still incumbent upon the plaintiffs to prove that the waxing was done negligently *resulting in a dangerous condition.* THERE IS NO DIRECT EVIDENCE THAT THERE WAS A DANGEROUS CONDITION. THE MERE FACT THAT MRS. STEPHENS FELL DOES NOT SO PROVE. Her testimony that she *seemed* to hit a greasy or slick spot, with no description by her or anyone else as to the appearance of the alleged spot, falls far short of evidence that there was a greasy or slick spot. The testimony of plaintiffs' witnesses that the floor was 'slick', 'shiny' or 'slippery' fails to definitely show a dangerous condition. These words of description are lacking in precision of meaning. What is 'slippery' to one person might not be 'slippery' to others. The same characteristic applies to 'shiny' and 'slick'. (Emphasis supplied.)
>
> "There is no evidence in this case that the defendant was negligent in maintaining the floor *or that there was a dangerous condition existing on the floor of the washroom where Mrs. Stephens fell.* (Emphasis supplied.)
>
> *Stephens -vs- Sears Roebuck & Co.,* (CA Ind. 1954) 212 F. (2d) 260, 261 .

In the case of *Gaddis -vs- Ladies Literary Club,* 4 Utah (2d) 121, 288 P. (2d) 785 (1955), the plaintiff fell on a floor that she alleged had been so excessively waxed as to be dangerous. The floor was described in the evidence as slippery and it was shown to have been recently waxed.

> "On appeal, plaintiff contends that the mere proof that a floor is slippery creates a jury question as to whether *any application* of wax to a floor is negligence. She cites to us a number of decisions from California, which, although most of them offer further evidence of negligence than appears in this case, apparently regard evidence of slipperiness as the basis for a determination of fact as to whether or not the floor was so slippery as to constitute a breach of the duty which defendant owed his invitees. (Citing *Nicola* et al.) These cases, however, recognize that slipperiness is a relative term and that the fact that a floor is slippery does not necessarily mean that it is dangerous to walk upon.
>
> The majority of courts in the United States hold that the mere application of wax to a floor will not constitute negligence, even though having some tendency to make the floor more slippery. (Citations.) To hold otherwise, these courts reason, is to permit the jury to act upon speculation and conjecture upon the plaintiff's testimony that he slipped on a floor which he deemed to have been made excessively slippery by defendant's application of wax. (Citation.)
>
> *Therefore, some condition beyond the fact that the floor was waxed and that the plaintiff fell is necessary to a cause of action for negligence in creating or permitting a dangerous condition to exist where people are expected to walk.* The proof in this case does not meet this test and the trial court did not err in refusing its submission to the jury. (Emphasis supplied.)
>
> *Gaddis -vs- Ladies Literary Club,* 4 Utah (2d) 121, 288 P. (2d) 785 (1955).

In *Vinson -vs- Brown,* 193 Ore. 113, 237 P. (2d) 501 (1951), the plaintiff fell on a floor that had been washed, waxed and polished the previous business day. She specified excessive wax as the cause of the dangerously slippery condition. She walked into the store ten or twelve feet and "all at once I just whirled around and went down." She described the floor as clean, shiny and slippery. The court noted that plaintiff's clothing was not soiled and there were no skid marks at the scene of the fall. There was no evidence of other falls or complaints of a slippery condition. After so summarizing the evidence, the court said:

> "The question now presents itself: Do the facts summarized above support a finding that the defendant's floor was in a negligent condition at the time of the plaintiff's fall?"
> 237 P. (2d) 502.

Impliedly the court ruled our res ipsa loquitur and specifically it gave consideration as to whether the proof of the recent waxing gave rise to any presumptions of inferences of negligence and concluded that it did not. Judgment n.o.v. was ordered entered for the defendant.

In *Hanson -vs- Lincoln First Federal Savings & Loan Association,* 45 Wash. (2d) 577, 277 P. (2d) 344 (1954), the plaintiff entered the lobby of the defendant's premises and proceeded a distance on a rubber mat. She then stepped off the mat to go to a customer's counter and slipped on the asphalt-tile floor adjacent to the mat which had been waxed eight days previously. The court noted that the law required the defendant to maintain the floor

reasonably safe for its patrons. It then searched the record for some proof of a dangerously slippery condition and concluded:

> "Neither the fact that plaintiff slipped and fell nor the fact that the floor was waxed, of itself, establishes or permits an inference of negligence. (Citation) —"
>
> "No fact is shown which would support a finding that the floor was so smooth that it actually was dangerous. (Citation) —"
>
> "We are unwilling to agree with plaintiff's contention that substandard conduct can be established by combining and totaling acts which meet reasonable standards."
>
> 277 P. (2d) 345.

The judgment sustaining a demurrer to the evidence was affirmed.

In *Bowser -vs- J. C. Penney Co.*, 354 Pa .1, 46 A(2d) 324 (1946), the plaintiff was nonsuited and appealed. The plaintiff fell while walking in an aisle which had been waxed the previous evening. Also, there was some evidence of an accumulation of wax in one spot, but to see it one had to stop and look "right down at it". The court held that the proprietor was not an insurer and observed as to the plaintiff's burden of proof:

> "We have held that it is not negligence per se on the part of an owner to wax or oil his floors: (Citation.) The fact that a person falls on a recently waxed floor does not of itself justify a finding of negligence on the part of the owner; (citation). But, if the floor is improperly waxed *thus creating a dangerous condition*, the question of negligence of the owner is for the jury: (Citations). However, the

trial judge should not permit an issue of fact to be presented to the jury, where the evidence is such that upon full belief and drawing of all proper inferences, reasonable men could not reach the conclusion there was negligence. Plaintiffs rest their claim of negligence on the ground that there existed a spot of wax on the store floor which caused Mrs. Bowser to fall and since this condition existed the proper inference to draw was that the wax was improperly applied. The real question is not whether there was an improper application BUT WHETHER SUCH ALLEGED IMPROPER APPLICATION CREATED A CONDITION so obviously dangerous to amount to evidence from which an inference of negligence would arise." (Emphasis supplied.) (Nonsuit was affirmed.)

In *Osborn -vs- Klaber Bros., 227* Iowa 105, 287 NW 252 (1939), the plaintiff fell on a "tile-tex" floor that had been waxed with liquid wax three days previously. She obtained a verdict and judgment and the defendant appealed. Her case was based upon her allegation that excess wax had created a dangerously slippery condition. She described her fall as "my foot went out from under me like that and I went down". She described the floor as "slippery and slick" and had some "shiny variation" to it.

"Though it was a most regretable accident, it appears to us that the evidence was so inadequate that the question whether defendants caused the floor to be excessively waxed should not have been submitted. Under the record an answer to this question would have been so conjectural that it would be outside a jury's proper functioning to pursue the query."

(Judgment was reversed.)

To the same effect are:

Vaughn -vs- Montgomery Ward & Co., 95 Cal. App. (2d) 553, 213 P. (2d) 417 (1950);

Thoni -vs- Bancroft Dairy Co., 255 Wis. 577, 39 N.W. (2d) 690 (1949);

Shumaker -vs- Charada Inv. Co., 183 Wash. 521, 49 P. (2d) 44 (1935).

III-B—(a)

MINORITY RULE OF *NICOLA* DISTINGUISHED

The foregoing cases represent the majority rule across the country under facts substantially similar to those involved here. They illustrate the direct application of the law announced in plaintiff's Instruction 8 and defendant's instruction 12 to the effect that under Montana law the proprietor must maintain his premises reasonably safe but he can wax or otherwise treat the floors *so long as* they remain reasonably safe for their intended use. These are the cases behind the true law of the case which the court should have followed and applied!

It should be noted that the defendant has not contended that the majority rule (which is the rule Montana would adopt) is that which obtains in a number of jurisdictions to the effect that if a proprietor uses ordinary care in the selection and application of his floor dressing, he cannot be held liable *irrespective* of his having created what could reasonably be considered to be a dangerously slippery floor condition at the time and place of the accident. Such rule, illustrated by the following cases, is probably as far in favor of no liability in slip and fall cases as

the *Nicola* line is in favor of res ipsa loquitur; and Montana by virtue of her basic case law in the "falls-in-stores-field" (this brief at page 18) would follow neither one.

J. C. Penney -vs- Kellermeyer, 107 Ind. App. 253, 19 NE(2d) 882 (1939);

Dunham -vs- Hubert W. White, Inc., 203 Minn. 82, 279 NW 839 (1938);

Linders -vs- Bildner, 129 NJL 246, 29 A.(2d) 182 (1942);

Peterson -vs- Empire Clothing Co., 293 Mass. 447, 200 NE 399 (1936);

Overby -vs- Union Laundry Co., 28 NJ Super. 100, 100 A(2d) 205 (1953);

Iorio -vs- Rockland Light & Power Co., 274 App. Div. 791, 79 NYS(2d) 217 (1948);

Tenbrink -vs- F. W. Woolworth Co., (RI, 1931) 153 A. 245;

This brings appellant to a consideration of the *Nicola* case (R. 13).

Nicola Decision

In the case of *Nicola -vs- Pacific Gas & Electric Co.,* 50 Cal. App. (2d) 612, 123 P. (2d) 529 (1942), the court did not have to depart from the general rule that if a dangerously slippery floor condition is proved to exist at the time and place of the accident, it is then proper for a jury to inquire further as to what, if anything, the treatment of the floors had to do with such condition. Also, that court did not have to abandon that same general majority rule in rejecting that line of cases, supra, urged by the *Nicola* defense that a proprietor is *not* responsible for a floor that is proved *not to be reason-*

ably safe at the time and place of the accident *unless* he is also proved to have been negligent in the floor dressing which he selected or the manner in which it was applied. And this appellant has no quarrel with the actual holding of *Nicola* that a case sufficient to go to the jury had there been proven and that the line of cases absolving a proprietor of responsibility for a dangerously slippery floor condition if the plaintiff also doesn't prove negligence in the selection and application of wax was the law of California or of the majority of the states. BUT APPELLANT MOST SERIOUSLY QUARRELS WITH THE PROPOSITION FOR WHICH *NICOLA* IS CITED BY THIS TRIAL COURT AND AS APPLIED IN THE *CAGLE* CASE ALSO RELIED UPON (R. 13) TO THE EFFECT THAT IRRESPECTIVE OF A PLAINTIFF'S *NOT HAVING PROVED* A DANGEROUSLY SLIPPERY FLOOR CONDITION AT THE TIME AND PLACE OF THE ACCIDENT BY COMPETENT EVIDENCE, THE CASE CAN NEVERTHELESS BE SUBMITTED TO A JURY FOR IT TO SPECULATE, WITH THE PROOF OF THE PARTICULAR ACCIDENT BEFORE IT, AS TO WHETHER THAT PARTICULAR FLOOR SHOULD *EVER* BE WAXED, AND THEN PREDICATE NEGLIGENCE AND LIABILITY ON THE POSSIBLE OUTCOME OF SUCH SPECULATION!

That is what was done in the instant case. That is what the *Cagle* case approves. That is what the *Nicola* doctrine is supposed to stand for, AND THAT IS NOT THE LAW!

In *Cagle -vs- Bakersfield Medical Group,* 110 Cal. Ap. (2d) 77, 241 P. (2d) 1013 (1952), the Dsitrict Court of Appeals for the Fourth District Court of California had this to say of the *Nicola* language:

> "From the decision in that case it might be held that under proper circumstances, considering the type of floor and the type of patrons using the floor, *a jury might well find the application of any wax at all might be a violation of the duty to use ordinary prudence and caution to avoid injury."* (Emphasis supplied.)
>
> 241 P. (2d) 1015.

Thus the *Cagle* court pushes the pendulum to the opposite side of the stroke from the equally erroneous (under Montana law) cases (page 43, supra) which also ignore the necessity of making absolutely fundamental the proof of whether the floor at the time of the accident was or was not reasonably safe. Both extremes are erroneous under Montana law and the majority rule.

And the *Cagle* analysis was no idle commentary. For in that case, which is factually very similar to this one, the plaintiff fell on the marbleized tile floor which was described as "very highly polished, slick looking". Both feet went out from under her and she went backwards. Her husband said the floor "looked" slick and shiny. Neither he nor the plaintiff examined it. There was, of course, no proof as in this case that the floor was *not* slippery. The defendant didn't challenge the quantum of proof on the issue of the existence of a dangerously slippery condition but rather went on the other minority rule, cited above at page 43 and rejected in *Nicola,* that if it did everything "according to the book" in its treat-

ment of its floors, it shouldn't be held liable even if a dangerously slippery floor condition resulted. And if there were competent proof (not shown in the opinion) of the existence of such a dangerously slippery condition, the opinion would not be open to challenge; however, by virtue of the analysis made therein of the *Nicola* case and the rejection of the *Vaughn* case (*Vaughn -vs- Montgomery Ward & Co.*, 95 Cal. App. (2d) 553, 213 P. (2d) 417 (1950) which announces the general rule and directly conflicted with the *Nicola* dictum, and the court's continued use of the standard "slippery" rather than *"dangerously slippery"*, it clearly appears that the court approved the process of allowing the jury to speculate as to whether that particular floor should ever be waxed and base liability on such speculation, irrespective of an absence of competent proof that the floor was *dangerously slippery* at the time of the accident.

The annotator in 63 A.L.R. (2d), "Slippery Floor—Injury", 634, Section 9, has picked up and commented on this same *Nicola* dictum which *Cagle* seized when he noted:

> "And a California court has ruled that evidence that a floor within business premises has been rendered slippery by the application of wax is sufficient to support a finding of negligence. (Citing Nicola.) IT MAY BE COMMENTED THAT THIS RULING SEEMS NECESSARILY THE EQUIVALENT OF A RULING THAT PROOF OF WAXING IS EVIDENCE OF NEGLIGENCE, SINCE *SOME DEGREE* OF SLIPPERINESS OF THE SURFACE WAXED WOULD APPEAR TO BE AN INEVITABLE RESULT OF THE WAXING." (Emphasis supplied.)

See also *Gaddis -vs- Ladies Literary Club*, 4 Utah (2d) 121, 288 P. (2d) 785 (1955).

It is not the law of the majority of the courts (Section III-B, supra, page 35) that a plaintiff can pull himself up by his boot straps to a prima facie case in these unexplained, slip-and-fall cases by first proving the fall; then proving a recent waxing and then insist that a jury question has been created so that in the jury's hands it can be inferred (from the fall) that this particular floor *never* should be waxed and that therefore the defendant was negligent and is responsible for the otherwise unexplained fall. When a court will permit it, as here, the burden of *proving* a *dangerously slippery condition* at the time and place of the accident is neatly finessed!

Dixon -vs- Hart, 344 Ill. App. 432, 101 N.E. (2d) 282 (1951).

The other two cases cited by the court with *Nicola* and *Cagle* (R. 13), namely, *Baker -vs- Mannings, Inc.,* 122 C.A. (2d) Cal. 390, 265 P. (2d) 96, (1953), and *Chase -vs- Parry,* (Okl. 1958) 326 P. (2d) 809, are readily distinguishable on their facts from the instant case and therefore might not actually espouse the boot-strap doctrine described above; however, since the proof of the dangerously slippery condition is weak in each (although there at least is some, as distinguished from this case), and each appears to approve of the *Nicola* dictum and the *Cagle* interpretation, it is apparent why the trial court in this case cited them along with *Cagle* and the *Nicola* dictum which it erroneously adopted as the "law of the case". As such, they conflict with the majority rule.

It is apparent that this boot-strap theory of proof is tantamount to holding res ipsa loquitur applicable; and

that is precisely what developed after *Cagle* in California's Fourth District Court where it originated. *Cagle* was decided there in 1952. Thereafter in 1954 the same court with the same judges on the bench decided *Scribner -vs- Bertmann*, 129 CA (2d) 204, 276 P. (2d) 697 (1954). That was a slip-and-fall case where the plaintiff fell on a bakery floor which had been waxed the day before. Plaintiff was wearing "Cuban" heels, 2 to 2½ inches high. Plaintiff's daughter testified as to skid marks in the wax 10 to 12 inches long. She also described the floor as highly polished. She entered the store at about 10:00 A. M. on Monday, following the store's having been waxed the day previous. It was one of plaintiff's main contentions:

> "that since it was undisputed that the floor had been waxed the day before the accident and that plaintiff, an invitee, slipped thereon, an inference of negligence arose upon the part of the invitor." (Citing Nicola and Cagle and cases involving res ipsa loquitur.)

The court ruled that res ipsa loquitur was not applicable and construed *Cagle* and *Nicola* as having involved proof of a *dangerously slippery* floor. However, the actual *Cagle* opinion does not support that analysis:

> "In this case there is no such evidence of previous accidents but there is proof of the existence of the highly polished AND POSSIBLE SLIPPERY CONDITION of the floor for a period of at least six weeks, and such evidence might support an inference of notice or at least be sufficient to place the question of notice in the hands of the jury." (Emphasis supplied.)

"If we assume the existence of the facts and inferences most favorable to the plaintiff, we must conclude that the jury believed that the plaintiff, while walking in an ordinary and prudent manner, slipped and fell on a highly polished SLICK AND SLIPPERY FLOOR WHICH HAD BEEN MAINTAINED IN A SLIPPERY CONDITION BY THE DEFENDANTS over a period of several weeks by the application of an excessive amount of wax to the floor. There being substantial evidence of these facts in the record, the question was for the jury alone to decide whether defendants were negligent and whether or not defendants had notice of such condition." (Emphasis supplied.)

Cagle -vs- Bakersfield Medical Group, 110 C.A. (2d) 77, 241 P. (2d) 1013, 1016 (1952).

Nowhere in this *Cagle* opinion does the court say that a *dangerously* slippery condition had been proved or had to be proved to make out a prima facie case. It would seem in the Fourth District, at least, in California that *Cagle* and the *Nicola* dictum have been repudiated. The *Scribner* court also cited the middle of the road, majority rule case of *Vaughn -vs- Montgomery Ward & Co.,* 95 Cal. App. (2d) 553, 556, 213 P. (2d) 417, in direct opposition to plaintiff's contentions and which it was loath to do in *Cagle*; so it would appear that whatever weight the *Nicola* dictum as construed and applied in *Cagle* had in California as a district court decision has been nullified by the later *Scribner* holding in favor of the strictly majority rule of *Vaughn.*

The *Vaughn* case wholly subscribes to the proposition that the plaintiff *must prove* the existence of a dangerously slippery condition and that it is not enough to show

a fall and recent waxing to raise a jury question of negligence:

> "The plaintiff was a business guest of defendant. To her the defendant owed a duty of exercising reasonable and ordinary care to keep the premises in a reasonably safe condition. But the owner of a place of business is not an insurer of the safety of his invitees. In order to impose liability on the owner IT MUST BE *SHOWN* THAT A DANGEROUS CONDITION EXISTED, and that the defendant knew or should have known of it. While under some circumstances negligence may be inferred from the existence of a dangerous condition, THE BURDEN RESTS UPON THE PLAINTIFF TO SHOW THE EXISTENCE OF A DANGEROUS CONDITION, AND THAT THE DEFENDANT KNEW OR SHOULD HAVE KNOWN OF IT. No inference of negligence arises based simply upon proof of a fall upon the owner's floor. The doctrine of res ipsa loquitur is not applicable to such cases." (Emphasis supplied.)
>
> 213 P. (2d) 419

DEFENDANT RESPECTFULLY SUBMITS THAT THE *NICOLA* DICTUM AND THE *CAGLE* CONSTRUCTION AND APPLICATION OF THE SAME ARE NOT REPRESENTATIVE OF CALIFORNIA LAW AT THIS TIME AND THAT UNDER THE LAW OF THE LEADING CASE OF *VAUGHN -vs- MONTGOMERY WARD,* SUPRA, THE PLAINTIFF MUST PROVE BY COMPETENT EVIDENCE THE EXISTENCE OF A DANGEROUSLY SLIPPERY FLOOR CONDITION APART FROM THE FALL ITSELF AND THAT IF NO SUCH CONDITION IS PROVED, A PRIMA FACIE CASE HAS NOT BEEN PROVED!

"Competent Evidence"

The majority rule cases (supra at pages 35 to 42) and the California case of *Vaughn* require that the plaintiff prove by competent evidence apart from the fall itself, that the floor in question was dangerously slippery. Thus, in this case, if one excludes from one's mind the happening of the accident and focuses on plaintiff's "proof" here of a dangerously slippery condition, what does one see? There is NOT A SINGLE SHRED OF EVIDENCE AS TO THE EXISTENCE OF A DANGEROUSLY SLIPPERY CONDITION OTHER THAN PLAINTIFF'S CHARACTERIZATION OF THE FLOOR AS "SHINY" AND "SHINIER THAN I HAD EVER SEEN". At page 27, supra, are a string of authorities that such characterization is no evidence at all of the existence of a dangerously slippery condition.

CONCLUSION AS TO DEFENDANT'S THIRD SPECIFICATION OF ERROR

Defendant respectfully submits to this Court of Appeals that the trial court erred in seizing on the *Nicola* dictum as applied in the cases of *Cagle* et al. (R. 13) as the law of this case. The law upon which the instructions were and had to be founded was Montana law as supplemented by the general rule.

The general rule requires as in any other non, res ipsa loquitur cases, that if the plaintiff alleges the existence, as here, of a dangerously slippery condition, she must prove it by a preponderance of the evidence and wholly apart from the happening of the accident in question.

Nicola and *Cagle* do not so hold. They say that if it is shown that a person falls on a recently waxed floor, it then becomes a jury question to determine if that particular floor should ever have been waxed with the concomitant power to predicate possible liability upon the outcome of that speculation.

The *Nicola* language which impressed this court and the *Cagle* tribunal prior to the *Scribner* case was dictum. The *Cagle* case was a California District Court decision which has since been discredited by the *Scribner* holding. It certainly was error for this Montana court in this diversity case to abandon general, majority-rule principles of proof and seize on *Nicola, Cagle, et al.,* as the law of this case!

Under the applicable and controlling *majority* law as represented by *Vaughn* in California and the host of cases across the country cited at pages 35 to 42 of this brief, this appellant most seriously submits that the trial court erred in overruling its motion for judgment n.o.v. and that such error should be corrected by this distinguished court and judgment for the defendant entered.

Specification of Error IV

The Court Erred in Not Granting Defendant's Motion For a New Trial.

A. VERDICT AGAINST CLEAR WEIGHT OF EVIDENCE

a) Trial Court Erroneously Adopted *Nicola* Line of Cases as Standard Against Which to Measure Sufficiency of Plaintiff's Proof.

Under specifications of Errors I and II, supra, the trial court's error in abandoning Montana substantive law

and the weight of authority and seizing upon the conflicting rule of *Nicola, Cagle et al,* is established. The court made such minority decisions the "law of the case"; therefore, for all the purposes of defendant's motions, including the motion for a new trial on the ground that the verdict was against the *clear weight of the evidence,* the court was applying an improper standard which has been shown not to require the proof of a dangerously slippery condition at the time and place of the accident by competent testimony as a condition precedent to proving a prima facie case.

b) "Clear Weight of Evidence" Rule

"Clear weight of the evidence", which is the yardstick for weighing the evidence under a motion for a new trial, is substantially less rigid from the defendant's viewpoint than the "substantial evidence" measure used under motions for judgment n.o.v.

> "Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. (Citation). Verdict may be set aside and new trial granted, when the verdict is *contrary to the clear weight of the evidence,* or whenever in the exercise of a sound discretion the trial judge thinks this action *necessary to prevent a miscarriage of justice."* (Emphasis supplied.)
>
> *Aetna Casualty & Surety Co. -vs- Yeatts,* (CA Va. 1941) 122 F. (2d) 350, 354.
>
> 3 Barron & Holtzoff, 343 sec. 1302, "Fed .Practice and Procedure".

c) Court Erred in Not Granting New Trial

If the trial court had not adopted the *Nicola* line as the law of the case but had measured the proofs under the majority rule set forth under Specification of Error III, supra, then it would most certainly have granted the defendant a new trial if judgment n.o.v. were not granted. Of course, the Circuit Court will not again be here burdened by a summary of the facts and majority rule law. And it is enough to observe that since the plaintiff did not adduce substantial evidence in support of her verdict and judgment, as established in these foregoing portions of this brief, then, a fortiori, *the clear weight of the evidence,* as weighed against the majority rule, does not support the verdict! And if, for any reason, this defendant is not entitled to judgment n.o.v., at least it is entitled to a new trial.

B. THE AMOUNT OF THE VERDICT IS NOT JUSTIFIED BY THE EVIDENCE, IS EXCESSIVE AND PREDICATED UPON PASSION AND PREJUDICE

a) Pleadings, Facts, Instructions and Trial Court's Order Relevant to Damages.

Plaintiff, in her complaint, has specifically limited her prayer for damages in this case to the following items and to the following amounts:

1. General Damages, $10,000.00;
2. Out-of-pocket medical expenses, $400.00;
3. Future medical expenses, $2,500.00;
4. Loss of wages to time of trial, $3,000.00; and
5. Permanent loss of wages or earning capacity, $45,000.00.

She prays for $59,650.00, total damages. (R. 4-6.)

Her out-of-pocket medical expenses were limited by proof to a total of $148.50. (R. 64-65.) Her weekly loss of earnings was estimated at $78.00 per week, or a total of $3,000.00 at time of trial. (R. 60.) The testimony would have supported a finding that future medical expenses would be as high as $2,500.00. Also, assuming plaintiff proved a prima facie case, there appears to be no basis to argue that an award of $10,000.00 general damages was unsupported by the evidence. The above sums total $15,648.50. The remainder of the verdict, $20,851,50, must be accounted for as the jury's evaluation of Miss Murphy's alleged future loss of earnings or earning capacity.

There was no evidence introduced as to plaintiff's life expectancy; mortality tables were not used, nor was the court asked to take judicial notice of such tables; the present cost of an annuity equal to plaintiff's loss of earnings was not before the jury, nor was the court asked to take judicial notice of such value. Neither the court nor the jury took into consideration the plaintiff's age, effect of income tax on earnings, or her pre-existing arthritic condition and its effect on her future earning capacity.

The jury was instructed on the items of damages which were compensable but was not given any criterion upon which to base any evaluation as to plaintiff's alleged loss of future earnings or earning capacity.

Defendant moved for a new trial upon the ground, among others, that the amount of the verdict was not justified by the evidence, was excessive and predicated

upon passion and prejudice. Thus, the question of excessive damages was saved for review.

Complete Auto Transit -vs- Floyd, (CA 5th, 1958) 249 F. (2d) 396, 399;

Southern Pacific Co. -vs- Guthrie, (CA 9th, 1951) 186 F. (2d) 926, 932, 933.

In his order denying defendant's motion, the trial court held that the verdict was not excessive in light of the severity of plaintiff's injuries, pain and suffering, loss of work to time of trial and permanency of injuries. Nowhere in its order did the trial court allude to evidence which would have established some basis for the jury's evaluation of plaintiff's loss of future earnings or earning capacity at $20,851.50.

b) The Complaint Constitutes a Limitation of the Amount Plaintiff May Recover on any Specific Item of Damage.

It was pointed out at page 55, supra, that plaintiff's pleading and proof limited recovery in this case for all items of damage except loss of future earnings or earning capacity to the sum of $15,648.50. It is the general rule that special averments as to amount of alleged damages control over the general ad damnum clause in a complaint.

15 Am. Jur. 751, Damages, Section 309;

25 C.J.S. 749, Damages, Section 130;

17 C.J. 999, 1000, Damages, Section 301;

7 Bancroft's Code Practice and Remedies, 7976, Sec. 6034;

Kerry -vs- Pacific Marine Co., 121 Cal. 582, 54 Pac. 89, 92 (1898);

Muskogee Electric Traction Co. -vs- Fore, 77 Okla. 234, 188 Pac. 327, 328 (1920);

Frost -vs- Mighetto, 22 Cal. App. (2d) 612, 71 Pac. (2d) 932, 935 (1937);

And cf. *Wilber -vs- Wilber*, 63 Mont., 587, 207 Pac. 1002 (1922);

Hageman -vs- Arnold, 79 Mont. 91, 254 Pac. 1070 (1927).

In *Frost -vs- Mighetto*, 22 Cal. App. (2d) 612, 71 P. (2d) 932, 935 (1937), the trial court allowed special damages in amounts greater than those alleged in the complaint. In modifying the judgment to conform to the declaration, the court, quoting from *Meisner -vs- McIntosh*, 205 Cal. 11, 269 Pac. 612, said:

> " 'The authorities overwhelmingly support appellant's contention. "The rule is firmly established that irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his bill or other pleadings." 15 R.C.L. 604. "A judgment cannot be properly rendered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration or complaint." 33 Cor. Jur. 1164'."

Rule 9 (g), Federal Rules of Civil Procedure, 28 U.S.C.A. requires that items of special damage, when claimed, must be specifically pleaded, however, we have been unable to find any authorities specifically on the point contended for above. Of collateral interest, however, is the case of *Meyerkorth -vs- McKeone*, (D.C. Mo. 1945) 4 F.R.D. 323, which held that specific acts of negligence pleaded superseded general charges of negli-

gence. And in 5 Cyclopedia of Federal Practice, 600-601, Section 15.646, the authors state the following rule with regard to the binding effect of pleadings on the pleader:

> "A plaintiff or defendant generally is bound by that which he alleges or admits in his pleading, unless he withdraws it by proper amended or supplemental pleading; and he is estopped to contest or deny it, or to introduce proof in contradiction or variance thereof, to the surprise and material prejudice of the other party."

The above authorities are controlling in this case and limit plaintiff's recovery to the amounts and items of damages specifically alleged. Thus, her general damages are limited to $10,000.00, and her special damages to $5,648.50, plus that amount, if any, of the alleged future loss of earning for which proper proof was adduced. If the jury's guess of $20,851.50 for this last item isn't legally supported, the verdict cannot stand.

C. The COURT OF APPEALS HAS THE POWER TO REVIEW THIS QUESTION OF EXCESSIVE DAMAGES

There is no question but what the Court of Appeals has the right to review the District Court's order regarding damages. Section 28 U.S.C.A. 2106, as amended, provides that a court of appellate jurisdiction "may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review". The question of excessive damages has been given particular attention in the following cases which delimit the appellate court's power of review.

Plumbers & Steamfitters Union Local No. 598 -vs- Dillion, (C.A. 9th, 1958), 255 F. (2d) 820, 824;

Complete Auto Transit -vs- Floyd, (C.A. 5th, 1957), 249 F. (2d) 396, 399-401;

Baldwin -vs- Warrick, (C.A. 9th, 1954), 213 F. (2d) 485;

Southern Pacific Co. -vs- Guthrie, (9 C.A., 1951), 186 F. (2d) 926;

New Amsterdam Casualty Company -vs- Wood, (C.A. 5th, 1958), 253 F. (2d) 71, 72;

Ohio Oil Company -vs- Elliot, (C.A. 10th, 1958), 254 F. (2d) 832, 835-836.

There apparently exist three rules regarding reversal or modification of a District Court ruling on excessive damages:

1) Cases in which it can be demonstrated that the verdict includes amounts allowed for items of claimed damage of which no evidence whatever was produced.

   Southern Pac. Co. -vs- Guthrie, (9 C.A. 1951), 186 F. (2d) 926 at 931;

   Campbell -vs- American Foreign S. S. Corporation, (C.A. 2nd, 1941) 116 F. (2d) 926 at 928-929.

2) Cases in which the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion.

   Southern Pac. Co. -vs- Guthrie, (9 C.A. 1951) 186 F. (2d) 926 at 932, (citing cases).

3) Where the verdict is "grossly excessive" or "monstrous".

   Southern Pac. Co. -vs- Guthrie, (9 C.A. 1951) 186 F. (2d) 926 at 933;

Plumbers & Steamfitters Union Local No. 598 -vs- Dillion, (C.A. 9th, 1958), 255 F. (2d) 820, 824;

Baldwin -vs- Barwick, (C.A. 9th, 1954), 213 F. (2d) 485 at 486.

D. THE VERDICT IS EXCESSIVE BECAUSE IT CAN BE DEMONSTRATED THAT IT INCLUDES AMOUNTS FOR ITEMS OF CLAIMED DAMAGE FOR WHICH NO EVIDENCE WAS PRODUCED.

As previously established, the plaintiff was limited in her pleading and proof to a total of $15,648.50, in damages for all items except that claimed for future loss of earnings or earning capacity. The question presented is whether, assuming that her proof will support a verdict for the fifteen thousand-odd dollar figure, is there any evidence to support any recovery for loss of future earnings or earning capacity? In determining the answer to this question, the court is bound to follow state court decisions and law relevant to measure of damages and amount of damage recoverable in any particular action.

28 U.S.C.A. 1652;

Vancouver Book & Stationery Co. -vs- L. C. Smith & Corona Typewriters, (C.A. 9th, 1943), 138 F. (2d) 635, cert. den. 64 S. Ct., 780, 321 U.S. 786, 88 L. Ed. 1077;

Mason -vs- U.S. (La. 1923), 43 S. Ct. 200, 260 U.S. 546, 67 L. Ed. 396;

Virginia Gas Co. -vs- Lafferty, (C.A. 6th 1949) 174 F. (2d) 848.

We are not asserting here that this Court's review of the evidence as to damages is restricted or relaxed by

a state court's decision or law. What we are asserting, is that state law is controlling where the issue presented is whether the verdict is excessive as a matter of law, or where the jury was improperly or insufficiently instructed, so long as adherance to the state court's decision or law does not subvert the right to trial by jury provided for in the Seventh Amendment to the United States Constitution.

Complete Auto Transit -vs- Floyd, (C.A. 5th, 1958) 249 F. (2d) 396, 399;

New Amsterdam Casualty Co. -vs- Wood, (C.A. 5th, 1958) 253 F. (2d) 71, 72.

In this connection, therefore, it is important that the Court's attention is directed to controlling state court decisions on the question of excessive damages in this case. In pursuance of such a course, appellant cites the following cases for the proposition that the verdict in this case is clearly unsupported by any evidence and is excessive *as a matter of law*:

Chenoweth -vs- Great Northern Ry. Co., 50 Mont. 481, 487, 148 Pac. 330 (1915);

Hall -vs- Northern Pacific Ry. Co., 56 Mont. 537, 548-549, 186 Pac. 340, 344 (1919);

Everett -vs- Hines, 64 Mont. 244, 262 208 Pac. 1063, 1068, 1069 (1922) where the court held that the supreme court would have reduced the verdict had it any basis therefor, but that any reduction on its part would be based on speculation and therefore it returned the case for a new trial;

Liston -vs- Reynolds, 69 Mont. 480, 502, 223 Pac. 507, 513 (1923);

Conway -vs- Monidah Trust, et al., 51 Mont. 113, 118, 149 Pac. 711 (1915);

Wegge -vs- Great Northern Ry. Co. et al., 61 Mont. 377, 388, 203 Pac. 360, 363, 364 (1921).

In the *Chenoweth* case, supra, an award of $25,000.00 was reduced to $15,000.00, in a personal injury suit, where there was a total lack of evidence on plaintiff's life expectancy, mortality tables, or the present cost of an annuity equal to the present worth of plaintiff's loss of earning capacity. The court also took special note of the fact that the jury was instructed on only two elements of damages in the case: pain and suffering incident to the injury, and impairment of earning capacity. This is precisely the case here. In the instant case there is no evidence whatsoever to support any portion of the judgment which must, because of pleadings and proof, be attributed to compensation for loss of future earnings or earning capacity.

Appellant is aware that this Court may take judicial knowledge of various factors which were not brought to the lower court's attention, for the purpose of affirming or showing the impropriety of the decision below.

American Legion Post No. 90 -vs- First Nat. Bank & T. Co., etc. (C.A. 2d, 1940) 113 F. (2d) 898;

5 Moore's Federal Practice 1343, Section 4309.

While the Court went quite far in judicially noticing various factors which would support the trial court's opinion in the case of *Southern Pacific Co. -vs- Guthrie,* (C.A. 9th, 1951) 186 F. (2d) 926, 932, 933, that case is clearly distinguishable here. In that case we have a

59 year old man who was working at the time of his injury; he was required to retire at the age of 70; it is common knowledge that his job would probably have been protected to the retirement date by union seniority; there was apparently no indication that he was suffering from any physical illness or defect which would reasonably shorten his working expectancy.

In this case Miss Murphy was working only sporadically at the time of the injury; she had a general arthritic condition throughout her spine which in its natural course would have diminished her working potential, i. e., carrying heavy trays, etc.; and, no retirement date was alluded to in this case. There is no indication as to what importance plaintiff's age—50, would have on her working potential. Again we must consider plaintiff's job of carrying heavily loaded trays in considering what this potential is. We submit that taking into consideration all of the factors of the case there just is no evidentiary basis upon which this Court can affirm the amount of the verdict. To affirm the verdict in this case would require the Court to speculate on numerous factors for which there is a complete lack of evidence. We are not contending here that the verdict should be reduced by $20,851.50, for this would be usurping the function of the jury and infringing upon the right of trial by jury protected on the Seventh Amendment to the United States Constitution.

See:

Complete Auto Transit -vs- Floyd, (C.A. 5th, 1958) 249 F. (2d) 396, 399;

New Amsterdam Casualty Co. -vs- Wood, (C.A. 5th, 1958) 253 F. (2d) 71, 72.

Conversely, to affirm the judgment would be usurping the trial jury's function just as much, because it would require the court to wander through a forest of speculation seeking some phantom evidentiary path, judicially noticed or otherwise, to sustain the judgment. One route, we submit, is as fallacious as the other to follow.

We, therefore, contend that this court should, as did the court in *Everett -vs- Hines,* 64 Mont., 244, 262, 208 Pac. 1063, 1068, 1069 (1922), refuse to speculate on what the jury did, or in what manner they arrived at awarding plaintiff a verdict for $36,500.00. Rather, in view of the paucity of evidence on the loss of earnings or earning capacity, or some criterion to guide the jury in their deliberations, the only result consonant with justice and equity to both parties would be for this Court to grant a new trial so as to place the question competently before another jury.

While it cannot be shown from the record that the trial court erroneously excluded from consideration matters which were appropriate to a decision on the new trial motion, (see *Southern Pacific Co. -vs- Guthrie,* (9 C.A. 1951) 186 F. (2d), at 932), we do firmly assert that in its order the court did not make mention of any of the features discussed above. The verdict was affirmed and defendant's motion denied because plaintiff had suffered a serious injury which, resolving the conflict of medical testimony in favor of the plaintiff, was permanent. Thus, we submit, the order itself, graphically illustrates the failure of the trial court or the jury to take into consideration the essential lack of evidence on the issue of loss of earnings.

For the foregoing reasons, we submit that the judgment should be reversed and the matter sent back for a new trial.

CONCLUSION

Two basic errors of the trial court have been shown to exist in this record: first, the court erred in adopting as the law of this case the isolated holding of an inferior court in California (*Nicola* and *Cagle*). By so rejecting the majority rule across the nation in these unexplained slip-and-fall cases requiring substantial proof of the existence of a dangerously slippery floor condition at the time and place of the accident and apart from proof of the fall itself, the court placed itself in a position where it could not properly rule on either defendant's motion for judgment n.o.v. or for a new trial on the ground that the verdict was against the weight of the evidence. (Specifications of Errors I, II and III.) Applying the majority rule to this record entitles appellant to the granting by this Court of its motion for judgment, n.o.v., or, if for any reason that does not appear proper, then, most certanly, to a new trial.

The trial court also erred basically (Specification of Error IV-B) in not granting a new trial by virtue of the total absence from the record of evidence from which the jury could fairly, lawfully and properly arrive at the $20,851.50 future loss of earnings which they awarded by guess.

For the foregoing reasons and supported throughout this brief by pertinent authority, defendant respectfully

submits that it is entitled to judgment n.o.v., or, alternatively, to a new trial.

Respectfully submitted,

JAMES A. POORE, JR.
ROBERT A. POORE
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By Robert A. Poore
Attorneys for Appellant

Service of the foregoing brief admitted and three copies thereof acknowledged this 11th day of February, 1960.

s/ Leif Erickson
by J. R. Richards
Attorney for Plaintiff

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA BUTTE DIVISION

MILDRED MURPHY,

Plaintiff,

-vs- No. 690

SAFEWAY STORES, INCORPORATED,

Defendant

PETITION FOR REMOVAL

Comes now the defendant, Safeway Stores, Incorporated, in the above entitled action, and presents this, its verified petition for removal of the above entitled action to the above entitled Court, and for the grounds of said removal respectfully shows and represents to this Honorable Court as follows:

1.

That the above entitled action was commenced in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

2.

That your petitioner was served with a copy of the Complaint and Summons on the 16th day of December, 1958.

3.

That the above entitled action is now pending in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, for

the recovery of the sum of $59,650.00 for injuries to the plaintiff allegedly occurring on June 24, 1958.

4.

That your petitioner disputes said plaintiff's claims and demands and denies any and all liability with reference to all claims as alleged in plaintiff's Complaint.

5.

That said action is of a civil nature and that the matter and amount in controversy in said cause and the amount of damages claimed therein exceeds, exclusive of interest and costs, the sum of $10,000.00.

6.

That your petitioner, Safeway Stores, Incorporated, is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and was at all of the times herein mentioned and now is a citizen of the State of Maryland, and is not a citizen of or a resident of the State of Montana.

7.

Your petitioner states upon information and belief that the plaintiff, Mildred Murphy, was at the time of the filing of said action in the State Court, and at all times since has been a citizen of the State of Montana, and a resident of Butte, Silver Bow County, Montana.

8.

That your petitioner desires to remove this cause for trial thereof to the District Court of the United States for the District of Montana, Butte Division, upon the grounds of diversity of citizenship of said plaintiff and your petitioner as hereinbefore particularly set forth.

9.

That this petition of your petitioner is accompanied herewith by a bond of good and sufficient surety, conditioned that the defendant will pay all costs and disbursements incurred by the removal proceedings should it be determined that the case was not removable or was improperly removed.

10.

That accompanying this petition and filed herewith is a true and correct copy of all process, pleadings and orders served upon your petitioner, Safeway Stores, Incorporated, as appear in the file in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, in the above entitled action.

WHEREFORE, your petitioner, Safeway Stores, Incorporated, files herewith the foregoing Petition for Removal, together with said bond and together with all of said process, pleadings and orders served upon your petitioner as appear in the files of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, and prays that this action be removed to this Court.

JAMES A. POORE, JR.
James A. Poore, Jr.
ROBERT A. POORE
Robert A. Poore
403-405 Silver Bow Block
Butte, Montana
Attorneys for Petitioner,
Defendant, Safeway Stores,
Incorporated.

STATE OF MONTANA)
) ss.
County of Silver Bow)

WILLIAM REEVES, being first duly sworn, upon oath, deposes and says:

That he is the District Manager of Safeway Stores, Incorporated, the defendant in the above entitled action, for the State of Montana, and as such District Manager makes this verification for and on behalf of said defendant; that he has read the foregoing Petition for Removal and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

WILLIAM REEVES

Subscribed and sworn to before me this 31st day of December, 1958.

ROBERT A. POORE
Notary Public for the State of Montana
Residing at Butte, Montana
My Commission expires November 18, 1961

(Notarial Seal)

APPENDIX B

Index of Testimony on the Negligence Issue and Summary of the Negligence Evidence From View Most Favorable to the Plaintiff.

Index of Testimony on Negligence Issue

Summary of the Evidence on Issue of Negligence

Plaintiff came to defendant's store on East Granite Street, Butte, Montana, at about 10 to 10:30 o'clock A.M. on June 24, 1958. (R. 25.) She intended to buy some coffee. (R. 28.) Walking at her normal gait (R. 31) "in regular walking shoes" (R. 32, 31) with rubber lift (R. 32) heels 1⅞" high (R. 72) and tapering to a floor surface diameter of about ¾" (R. 86), she entered the store at the front entrance and proceeded toward the coffee counter. The surface over which the plaintiff walked was flat (R. 69) and was covered by

asphalt tile which had been in continuous use for about 20 years. (R. 193.) The store was well-lighted and nicely laid out. (R. 69.) The plaintiff described the floor as "very shiny and nice and clean and all that, real shiny". (R. 33.) She had traded at the store as a regular customer for a number of years, and although she didn't pay much attention to the floors, she didn't believe that they had ever before appeared so shiny—at least "not so much". (R. 35.) The floors at that time were washed and waxed twice per week—Monday night and Thursday night after the store closed. (R. 321.) Sometimes Mr. Rodoni, the janitor who attended to the floors, waxed the whole floor and sometimes he didn't—depending on the shape the floor was in. (R. 333.) But about the first of 1959, (about 6 months after the accident), Mr. Rodoni commenced as a regular thing to wax the whole floor once per week and the front part of the store, around the check stands where the travel was heaviest, twice per week. (R. 333.)

The manner of cleaning and waxing the floor was as follows: first the floor was mopped with soap and water and dried. Then a little over a quart of liquid, Waxcraft, heavy duty industrial wax, which the Safeway Stores have tested and adopted for use, (R. 172) was sprinkled over the aisle-ways from a garden sprinkling can (D. Ex. 30). Approximately 2500 square feet of aisles (R. 207) are so sprinkled. Then the mop (D. Ex. 31) which had been sprinkled with liquid wax to make it soft and absorbent (R. 325) was used to go over the floor to get wax spread out over the whole floor. In the sprinkling operation Mr. Rodoni endeavored to stay three

or four inches away from the fixture edges. After a period of time the wax would tend to build up where there has been no traffic on it, (R. 331) such as under the over-hang of the bins and fixtures (R. 332), and from time to time such excess wax was removed by scraping (R. 175) and treatment with hot water and lye. (R. 331.) After the wax had been spread out over the floor, it dried in about thirty minutes. (R. 327.) This system of cleaning and waxing had been employed by Mr. Rodoni since the fall of 1956 when he went to work for Safeway. (R. 320.) For the three years prior to the accident, plus the nine months thereafter up to the time of trial, approximately 1,050,000 individual sales had been had at the store (R. 185) and more people than that had traversed its floors. Only two other slip and fall accidents were experienced, (R. 184) and of these only the plaintiff claimed the slip was Safeway's fault. (R. 185.)

(Mr. Rodoni's testimony is at pages 320-335 of the Record.)

The floor of the store had been cleaned and treated in Mr. Rodoni's usual manner (R. 328) the night before the accident. The plaintiff entered at about 10:00-10:30 o'clock on Tuesday morning, June 24, 1958. (R. 171.) Approximately 70-75 trades people and customers would have been in the store by that time in the morning, (R. 206) but not all of them would have traversed the spot where Miss Murphy fell (R. 216-217). During the entire day when better than 550 customers would have traversed the various parts of the store (R. 206), no other person slipped or slid or fell (R. 211).

Miss Murphy entered by the main door (end of arrow in defendant's picture exhibit 11) and proceeded along the windows of said exhibit to the window-end of the produce counter where a turnstile had been formerly located (R. 217) and then to her right down along the produce counter for a distance of about 15 ordinary walking paces (R. 220) to where she slipped and fell. She described her fall as follows:

> "About that time my two feet shot out in front of me and I fell flat on my back and head." (R. 31.)
>
> "Well, I just fell flat on my back and my head hit the floor, and I really heard and felt it." (R. 37.)

She was not knocked out (R. 38) but was dazed. (R. 37.) There were a number of customers in the store at the time (R. 313) but apparently only certain of the store personnel heard the fall and went to Miss Murphy's aid. Rose Ledingham, a checker, who was at the check stand back of "St. John's Bread" in defendant's picture exhibit D-11 (R. 312) heard the fall and described it as follows:

> "Q. Will you describe that thump that you heard?
>
> A. Well, it was an out-of-the-way noise; it was like a thump; it was enough to attract your attention."

Mr. Albert Squires, produce department manager, who was 30 to 40 feet (R. 242) down the aisle that Miss Murphy was just entering on her way to the coffee counter heard the fall and described it as follows:

> "Well, I was in that aisle where I think she had fallen, but I wasn't sure I heard this, well, kind of a strange noise, just a little different noise than you

would normally hear, and I turned and looked up the aisle, and I immediately went toward her." (R. 224.)

Tom Hart, another Safeway employee who was working with Albert Squires in the aisle, estimated he was about 20-25 feet from Miss Murphy when she fell and that her fall could be described as a "thud" or perhaps "not quite so blunt as that". (R. 247.) She fell her full length and raised a bump on the back of her head about 4 to 4½" in diameter. (R. 136.) Her attending physician believed that she had experienced a severe contusion with mild shock and mild concussion. (R. 137.) Plaintiff's sister, Mrs. Rosa, said that Rose Ledingham, the checker, had told her that Miss Murphy "got a terrible fall". (R. 378.)

Miss Murphy had not gotten to the coffee display counter when she fell, and she fell when she was passing from the end of the produce counter into the head of the aisle where Squires and Hart were working. (R. 307 explaining Picture Exhibit D10, showing head at circled (2) and arrow in direction of body and feet; R. 37; R. 238 explaining Picture Exhibit D9 and the circled (x) and (y). This point was down into the store and away from the windows (Picture Exhibit D11) and about 15 paces from where the entry turnstile formerly had been (R. 220) and past where the shopping carts are stored (Picture Exhibit D10) and in the general area where worn spots on the floor (Picture Exhibit D-12) indicate heavy traffic. (R. 186.)

Miss Murphy had no explanation as to why she fell. She did not say that there was any slick or slippery sub-

stance on the floor. Mrs. Rose Ledingham, who went to her aid from her nearby check stand and helped her up, testified that in lifting her up and generally trying to help her, and in going to and from Miss Murphy and her check stand during the period when Miss Murphy talked to Mr. Frazer, store manager, she didn't notice anything slippery about the floor. (R. 309.) She saw no skid marks or any foreign substance, although she inspected the floor. She saw nobody else slip or slide of the people who were right there helping Miss Murphy. (R. 308, 309.) Mr. Frazer, store manager, who was summoned by loud speaker to the scene immediately upon its happening (R. 312) made an inspection of the floor (R. 210) as did Albert Squires, (R. 230), Rose Ledingham, (R. 227), and Thomas Hart (R. 246); and no one of these persons who was either immediately on the scene or there shortly afterward saw any liquid or foreign substance or skid or slip or heel mark or slipped while being around and about Miss Murphy or in helping her up, and nobody saw anybody else slide or slip in that area. The plaintiff's clothing was not stained or soiled. (R. 82.) Nothing was done to or changed about the area where Miss Murphy fell, and during the balance of the day nobody else of the store personnel and the 550 patrons (R. 206) slipped or fell or had any difficulties there. (R. 211.)

Miss Murphy was not slowing down or turning or stopping. (R. 36, 74.) She was on her way to the coffee counter as her first stop (R. 30), which was a ways down the aisle which she was just about to enter. There was no evidence whatsoever that she was walking other than down the aisle in the ordinary manner; and all the

witnesses, including herself (R. 37), place her fall in about the middle of the aisle which she had been traversing alongside the produce counter and at the head of the aisle she was about to enter. (Picture Exhibits D10; D12; D9.)

APPENDIX C

Item	Exhibit No.	Nature	Record References		
			Identified	Offered	Received
1	P- 1	X-ray	98	99	99
2	P- 2	X-ray	105	105	105
3	P- 3	X-ray	109	110	110
4	P- 4	X-ray	112	113	113
5	P- 5	X-ray	115	115	116
6	P- 6	X-ray	118	119	119
7	P- 7	Can of Wax	171-172	172	174
8	P- 8	Can of Wax Remover	174	175	175
9	D- 9	Photograph	196	197	197
10	D-10	Photograph	196	197	197
11	D-11	Photograph	196	197	197
12	D-12	Photograph	196	197	197
13	D-13 through D-29 inclusive	X-rays	253	254	255
14	D-30	Sprinkling can	335	335	335
15	D-31	Mop	335	335	335
16	D-32 through D-34	X-rays	341	341	341
17	D-37, D-38	X-rays	350	350	350
18	D-39	X-rays	348	348	348

No. 16,649

IN THE

United States Court of Appeals

For the Ninth Circuit

SAFEWAY STORES, INC.,

Appellant and Defendant,

vs.

MILDRED MURPHY,

Appellee and Plaintiff.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Appellee's Brief

LEIF ERICKSON,
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Helena, Montana
Attorney for Appellee and Plaintiff

THURBER'S HELENA

TABLE OF CASES, STATUTES AND TEXTS

CASES

Page

STATUTES AND RULES

TREATISES

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Appellee's Brief

STATEMENT OF THE CASE

Appellant's statement of the case is substantially correct except that there is nothing in the record to indicate that the case was tried on the theory that Res ipsa loquitur was relevant. This is only wishful thinking on the part of the appellant. No instructions were offered on the theory and no reliance was or is had upon that theory by appellee.

Nor does plaintiff admit that there is a split of authority in California on the question of the degree of care owed by store keepers to their customers.

QUESTIONS INVOLVED

(1) Are Instructions given without objection the law of the case?

(2) May the appellant assign error, under Rule 51 of the Rules of Civil Procedure, in the giving of instructions to which it did not object?

(3) Is the evidence sufficient to sustain the verdict of the jury?

(4) Is the verdict against the weight of the evidence?

SUMMARY OF ARGUMENT

1. Appellant's tendered instruction Number 8 appearing at transcript 398 and the amendment offered by appellant to defendant's proferred Instruction Number 12 appearing at transcript 399 relating to the duty of a storekeeper in relation to waxing or polishing of his floors, not being objected to, became the law of the case, and were binding upon the jury.

2. Under Rule 51 of the Federal Rules of Civil Procedure appellant may not assign error for the giving, without objection by appellant, of the instructions referred to.

3. The evidence is sufficient to sustain the verdict of the jury both as to the negligence of the appellant and as to the amount of the damages.

4. The verdict is not against the weight of the evidence.

ARGUMENT

Because Judge Murray's order, denying appellant's motion for judgment in accordance with the motion for directed verdict or for a new trial (Tr. 12, 13, 14, 15, 16, 17, 18), covers so well and succinctly the principal questions raised in appellant's brief, appellee will not burden the court with a lengthy discourse on matters so well considered in the court's order. There are some arguments, however, in appellant's brief that will require some discussion as well as the citation of some additional authorities.

The argument will follow in the same order as in appellant's brief.

SPECIFICATION OF ERROR NUMBER I

The Instructions of the Court Given Without Objection Are the Law of the Case.

Appellant seeks by this specification to put the trial court in error for giving instructions to which appellant made no objection. This it may not do.

Rule 51, Federal Rule of Civil Procedure provides:

> "No party may assign as error the giving or failing to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The substance of Rule 51 is contained in Sec. 93-5101 Revised Codes of Montana, 1947.

The Montana Court in Ingman vs. Hewett, 107 Mont. 267, 271; 86 Pac. 2d 653 has stated the effect of the rule as follows:

> "The instructions constitute the law of the case which the jury is bound to obey. (citing cases). And a verdict contrary to the instructions is against the law, necessitating a new trial, and this even if the instruction be erroneous."

> See also Bush v. Chilcott, 64 Mont. 346, 353; 210 Pac. 907.

The Courts hold, under Rule 51, that the sufficiency of the evidence to sustain the verdict is to be tested by the law as stated in instructions not objected to even though the instruction be erroneous. National Surety Corporation v. City of Excelsior Springs, Mo. (CCA 8th, 1941) 123 F. 2d 573.

Appellee's instruction Number 8 appearing at page 398 and the amendment of appellant's instruction Number 12 appearing at page 399, clearly, as the court points out in its order (Tr. 13), adopt the rule of the following cases: Nicola v. Pacific Gas and Electric Co., 50 Cal.

App. 2d 612, 123 Pac. 2d 1013; Cagle v. Bakersfield Medical Group 110 Cal. App. 2d 77, 241 Pac. 2d 1013; Baker v. Mannings, Inc., 122 Cal. App. 2d 390, 265 Pac. 2d 96 and Chase v. Perry—Okla—326 Pac. 2d 809.

Appellant now urges that Judge Murray's statement in his order that the giving of appellee's instruction Number 8 and the amendment of appellant's instruction Number 12 made apparent that the Court was adopting the rule of the case last above cited is not correct. In effect, appellant is saying it did not object to the giving of these instructions because it did not realize the effect of the instructions.

Counsel seems to have forgotten that in accordance with Rule 10 (f) of the Rules of Procedure for the District of Montana,

> "Each requested instruction shall be numbered and written on a separate page, *together with a citation of authorities supporting the proposition of law stated in the instruction.*" (Emphasis supplied).

appellee cited in her instructions the authorities supporting the instructions and that on his copy of appellee's instruction Number 8 the Nicola case is cited as it was to the Court. Further, trial briefs were filed in which the cases mentioned in the order of the Court were cited and argued at length, as they were on the settlement of the instructions.

Appellant's position throughout its brief is that appellee must prove that appellant was negligent in its choice of materials used on the floor or in their application. This is the rule in jurisdictions not following the Nicola and Cagle cases and the instructions on their face clearly reject the rule contended for by appellant. This proof is not required under appellee's instructions Number 8 (Tr. 398) or the amendment to appellee's instruction Number 12 (Tr. 399) and the rule stated by the instructions is the rule of the Nicola, Cagle, Baker and Chase decisions.

The instruction Number 8 submitted by appellee reads:

> "Storekeepers are under the duty to keep the floors of their premises reasonably safe, as I say, for the people who are invited to pass over them. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which is superior to the right, or to the duty to use ordinary prudence and caution to avoid injury to those who come upon the premises. If a storekeeper has a floor waxed or polished, it must be done in such a manner that it remains reasonably safe for the invitee, for the people that the store owner, in this case, Safeway, invites into the store to do business."

The amendment to appellant's instruction Number 12 removes any doubt but that the court intended to reject

the rule contended for by appellant. The instruction is as follows, the amendment being italicized.

> "A store owner, such as Safeway in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is negligent in the materials he uses for the treatment or the manner of applying them, *or the creation of a dangerous slippery condition, so that thereafter the floor is not reasonably safe for its intended use by the customers in the store.*" (Emphasis supplied).

As the Court says the sufficiency of the evidence to support the verdict must be tested by the rule of these cases.

SPECIFICATION OF ERROR NUMBER II

Since the Instructions Adopting the Rule of the Nicola and Cagle Cases Were Given Without Objection, Appellant's Argument On Specification of Error Number II Has No Relevancy.

Because the instruction not objected to are the law of the case and because under Rule 51, Rules of Civil Procedure the appellant may not on appeal, urge that the adoption of the rule of the Nicola and Cagle cases was error, it is not necessary to discuss Erie v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 and the other cases cited by appellant on the question of the rules of decision. Appellee would like to point out, however, that the rule as to negligence of a storekeeper contended for by ap-

pellant is far from the universal rule the court found to exist in Werthan Bag Corporation v. Agnew (CA Tenn. 1953) 202 F. 2d 119, 124, 125, the case upon which defendant chiefly relies, as will appear from the cases cited later in this brief. Further, the true rule is that absent a precise and settled decision on a legal question by the state courts, the federal courts are not bound by the numerical weight of authority but they must seek to ascertain what the state court would do if it were passing on the precise question. Jackson v. Flohr (CA 9th, 1955) 225 F. 2d 607, Jackman v. Equitable Life Assurance Society, (CCA Pa. 1914), 145 F. 2d 945.

Montana's Code was adopted almost verbatim from the Code of California. Historically, Montana courts have looked with great respect on the decisions of the courts of California and have followed and adopted those decisions on questions of both statutory and common law. The Montana cases, cited by appellant on the duty of a storekeeper to the public, indicate strongly that the Montana Court would, on the facts here present, follow the California decisions.

SPECIFICATION OF ERROR NUMBER III

The Evidence Was Sufficient to Sustain the Verdict As to Appellant's Negligence.

As stated by Judge Murray in his order the sufficiency of the evidence is to be tested by the rule of the Nicola,

Cagle, Baker and Chase decisions. Further this court must be guided by the universal rule that in passing upon a motion for directed verdict,

> "The Court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all inferences that are fairly deducible from them. (citing cases). Where uncertainty as to the existence of negligence arises from a conflict in testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." (citing cases).
>
> Guning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 233.

Upon review of determinations of fact made in the trial court "only the evidence and inferences favorable to the successful party will be considered" 5A CJS 222.

A further rule is that "the preponderance of the evidence may be established by a single witness as against a greater number of witnesses who testify to the contrary." Batchoff v. Craney, 119 Mont. 157, 172 Pac. 2d 308.

In the Batchoff case the court pronounces the additional rule guiding appellate courts that:'

> "Where the evidence is conflicting, but substantial evidence appears in the record to support the judgment, the judgment will not be disturbed on appeal,

and this is especially true when the court as here, has passed upon the sufficiency of the evidence on motion for a directed verdict and motion for new trial and has upheld its sufficiency." (Emphasis supplied).

Here the opportunity to observe the witnesses is of even greater importance than in the ordinary case where only the credibility of testimony is involved.

In determining the question of the cause of the fall, the jury could be guided by appellee's physical appearance. Had she been overweight, awkward, crippled or otherwise handicapped, it would have been more likely that her fall might have been caused by something other than the slipping. The jury and the court had an opportunity to see the appellee, an opportunity this court does not have.

The opportunity to observe the witnesses is also important here in that the janitor, Rodoni, demonstrated how he applied the wax (Tr. 325). Judge Murray, who saw the demonstration, in his order referred to the demonstration and said the jury "saw this evidence and could have found negligence in such method of application." This court does not have the opportunity to observe this demonstration which was an important part of appellee's case.

With these basic rules in mind we turn to an examination of the testimony supporting the verdict.

On June 24, 1958, appellee Mildred Murphy entered appellant's store in Butte, Montana, to buy groceries. (Tr. 25, 28). She walked past the check stands and was passing the produce counter on the way to the coffee stand when she fell. (Tr. 31). She was walking in a normal manner 'not too fast' when both feet 'shot out in front' of her and she fell 'flat' on her 'back and head.' (Tr. 31, 37). She was wearing medium heel shoes (Tr. 31). She observed that the floor was 'real shiny' in the area where she fell and that she had never seen it so shiny, (Tr. 3). She did not stumble nor was she stopping or turning. (Tr. 36, 37). She heard her head hit the floor. (Tr. 37, 38). An employee of the appellant, Ledingham, some twenty feet away heard the 'thump' of appellee's head hitting the floor (Tr. 307, 311). Another employee 20 to 25 feet away heard the thud. (Tr. 288). The employee Squires heard the fall 30 to 40 feet away (Tr. 242). Appellant was dazed and a bump immediately rose on the back of her head (Tr. 41). She suffered immediate severe pain in her neck and lower back (Tr. 42). Her testimony as to the immediate effect of the fall is corroborated by the appellant's witnesses Frazer, and Ledingham.

Appellee believes if there were not other testimony the violence of the fall and the attending circumstances are sufficient to show, within the instructions, the floor where appellant fell was dangerously slippery.

This court considered a fact situation exactly the same as here in the case of Allen v. Matson Navigation Company (CA 9th, 1958) 255 F. 2d 273, 280. In making his order, Judge Murray quoted the following language from that decision:

> "Although the mere fact that Mrs. Allen fell would by itself be no evidence as to why she fell, yet the circumstances of how she fell, when considered with the other evidence in the case, has considerable significance. The witness who saw Mrs. Allen fall, as well as Mrs. Allen herself, testified that as Mrs. Allen walked across the landing, both her feet flew straight out in front of her and up into the air while she fell with a thud upon her back. That is at least some evidence that hers was a slipping fall."

This fall apparently was even more violent than suffered by the injured person in that case. The violence of the fall establishes that appellee fell as a result of slipping. In order for her to have slipped she must have been walking on a slippery surface and in view of the violence of her fall it must have been dangerously slippery. Appellee was walking slowly. She was wearing low heeled shoes in good condition. She did not stumble. (Tr. 36). She was not turning or stopping. As Judge Murray points out in his order, appellant possesses "a considerable degree of adroitness afoot." (Tr. 16). There was nothing to trip over or to slip on but the waxed surface of the floor. The floor had been waxed the night before. (Tr. 327). But one inference can be drawn and

that is that the floor was in a dangerously slippery condition. The jury could believe and had to believe, based on their common experience that no one could fall as did appellee if the floor were not dangerously slippery. The testimony set out above, alone "excludes every other reasonable hypothesis" to explain the fall. Fegles v. McLaughlin Construction Co. (CA 9th) 205 F. 2d 637.

But there is other testimony sustaining the conclusion of the jury, under the instructions, that the floor was in a dangerously slippery condition by reason of the waxing. That testimony is epitomised in the order of the court denying the motions.

Appellant maintains in its brief there was no testimony that the wax, through repeated applications, tended to build up. Judge Murray thought otherwise. (Tr. 14). For many years the whole floor, including the spot where appellee fell was waxed twice a week and appellant's manager said it tended to build up (Tr. 182) and that it was necessary to scrape it off and that it had last been removed some two months before appellee fell (Tr. 176). The janitor Rodoni testified it was necessary to remove accumulated wax with lye. (Tr. 331). He says it would build up even where people walked, apparently meaning in the aisle proper. (Tr. 32). There is evidence that the spot where appellee fell gets less traffic than other parts of the floor, (Tr. 334) and that the spot where she

slipped was not in the middle of the aisle but toward the edge where the traffic was lighter.

This the trial Judge could observe from the demonstrations and descriptions, which of necessity do not appear in the record. There is testimony that liquid wax as it builds up, tends to become more slippery. (Tr. 382).

That the spot where appellee fell was not subject to heavy traffic is further established by the testimony of appellant's employees that the spot is no longer waxed twice a week because the wax does not wear out so quickly there as in other parts of the store.

As the trial court pointed out in its order (Tr. 15) the evidence of the change in the practice as to the frequency of waxing was put in by defendant's witnesses. There was no objection to the testimony and the jury could consider it in passing on the principal question of negligence.

Finally the appellant itself had the janitor Rodoni demonstrate the manner of application of the wax. This Court must assume that the demonstration was such that the jury could infer negligence in the application of the wax. And it did. The janitor was required to sprinkle one quart of wax from an ordinary garden sprinkling can over the entire area of store, some 2,500 square feet. (Tr. 325). To do so he had to practically run backward as indicated by the testimony (Tr. 325). The trial court

which saw the demonstration concluded the jury might have determined, after viewing this demonstration, that there was negligence in the application of the wax. As a conclusion to the discussion of the evidence as to negligence, appellee believes the best answer to appellant's whole assignment is found in the following language from Judge Murray's order appearing at page 17 of the Transcript.

> "Counsel for defendant points to the lack of evidence in this case that there was a skid mark on the floor, or that there was after the fall, wax on the plaintiff's shoes or clothes, such as is found in some slip and fall cases. However, in those cases such evidence merely tends to establish an accumulation of wax on the floor, and that the plaintiff slipped on such wax, and is but one type of evidence establishing those facts. Here there was other types of evidence from which the jury could infer those facts. There is the evidence of the manager and the janitor that the wax tends to build up, that the floor had not been dewaxed for two months prior to the plaintiff's fall; that since the accident the number of waxings of the floor at the point of plaintiff's fall had been reduced, and the manner in which plaintiff fell as indicating a slipping fall.
>
> "The question of defendant's negligence was for the jury, and in the Court's view there was ample evidence to support the jury's finding on that question, and its verdict will not be disturbed."

Under the following decisions and under many of

the cases relied upon by appellant the evidence is sufficient to sustain the verdict.

Nicola v. Pacific Gas and Electric Co., 50 Cal. App. 2d 612, 613, 123 Pac. 2d 529. Here there was testimony of other witnesses that in their opinion the floor was slippery but what is said as to the question here presented is apt and we quote from that decision.

> "Appellant's argument goes further to assail the finding that the floor was maintained by defendants in a negligent manner, and they rely upon a rule, which has been followed by some courts in other jurisdictions that the duty of an owner to exercise ordinary care is not violated by merely oiling or waxing and polishing a floor in the usual way, although the floor is rendered slippery thereby. (Citing cases).
>
> This is contrary to the settled law as announced by our own courts."
>
> "Of course, slipperiness is an elastic form. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. *This is a question of fact.* The trial Judge could well have believed, from the evidence, that the surface of the floor was sufficiently hard and smooth to become unsafe with the application of wax, or soft soap and water as they were used by appellants * * *. * * * it was for the trial Judge to determine, *as a fact,* whether the condition was one which afforded reasonable safety to defendants patrons or, in other words, whether defendants

had exercised ordinary care with respect to the condition of the floor. Perhaps it would have been an entirely justifiable conclusion that the floor, although slippery, was reasonably safe for public use or that defendants used ordinary care with respect to its condition, but *those questions of fact* have been decided to the contrary upon substantial evidence, and we could not, even if we were so inclined, substitute our judgment for that of the trial judge." (Emphasis supplied).

In *Baker vs. Mannings, Inc., Calif. App., 265 Pac. (2d) 96* the Court points out that the jury might have inferred negligence from a number of different items of testimony. The testimony there was that the portion of the floor where the plaintiff fell was less used than other portions of the floor, that testimony being practically the same as in the instant case. There was also testimony, as in the instant case, that wax tended to build up and accumulate on the less used portion of the floor and that excessive amounts of wax could produce a slippery and dangerous condition. The Court said that from these two items of testimony and from the fact that the floor had been waxed for 80 successive weeks, (here the floor had been waxed twice a week for two years prior to plaintiff's fall), negligence could be inferred, citing the Nicola case. In the Baker case there was testimony that there was an eraser like streak on the floor and a streak of wax on the side of plaintiff's shoe. That was only one of the factors, the Court said, that could be considered in deter-

mining negligence, and the existence of that testimony was not made the basis of the reversal of the lower Court's instructed verdict.

"In *Cagle vs. Bakersfield Medical Group, 110 Cal. App. (2d) 77, 241 Pac. (2d) 1013,* the same argument was made as made by the defendant here, that there was an obligation on the part of the plaintiff to show specific negligence in the manner of applying the wax and some departure from the ordinary custom of waxing floors. The argument was rejected by the Court. There the wax had been applied ten days before the plaintiff fell. There was no evidence that others had fallen on the floor, as was true in the Nicola case. The Court said, in discussing the Nicola case, that:

> "From the decision in that case it might be held that under proper circumstances, considering the type of floor and the type of patrons using the floor, a jury might well find that the application of any wax at all might be a violation of the duty to use ordinary prudence and caution to avoid injury. (Citing cases)."

In conclusion the Court said:

> "If we assume the existence of the facts and inferences most favorable to the plaintiff, we must conclude that the jury believed that the plaintiff, while walking in an ordinary and prudent manner, slipped and fell on a highly polished, slick and slippery floor which had been maintained in a slippery condition by the defendants over a period of several weeks by the application of an excessive amount of wax to the

floor. There being substantial evidence of these facts in the record, the question was for the jury alone to decide whether defendants were negligent, and whether or not defendants had notice of such condition."

In Western Union v. Blakely—Miss.—140 So. 336 the plaintiff fell on a floor she claimed was wet from mopping. Defendant claimed the floor had not been mopped but plaintiff testified she saw mop marks. In sustaining the jury's verdict the court said:

"In our opinion, this evidence is for the jury's decision, and if the jury believed from the evidence that the floor was wet and slick, as testified to by the plaintiff and it was an unsafe place for a person to walk, the recovery should be upheld. It was the duty of the Telegraph Co. to have the office in which the public are invited to transact business with and for the benefit of the company, kept in reasonably safe condition."

In the case of Moore v. Great Atlantic Pacific Tea Co., ____Mo.____ 92 S.W. 2d 912. Plaintiff fell on a floor recently cleaned with a product called Climalene. Plaintiff testified Climalene tended to make a floor slippery and the court held the question of negligence to be for the jury.

The court's attention is called to the following cases in addition to those cited above which reject the argument that negligence in choice of materials and in their application must be shown to establish negligence.

Ten Ball Novelty and Manufacturing Co. vs. Allen ____Ala.____, 51 So. 2d 690;

Shipp v. 32nd St. Corp. 30 N.J.L. 518 33 Atl. 2d 852;

Gill v. Meir and Frank Co. ____Ore.____, 303 Pac. 2d 21;

Taylor v. Northern States Power Co., ____Minn. ____ 264 N.W. 139;

O'Connor v. J. C. Penney Co., ____Minn.____ 2 N.W. 2d 419;

Gray v. Fitzgerald and Platt, ____Conn.____, 127 Atl. 2d 76;

Charles v. Commonwealth Motors, 195 Va. 576, 79 S.E. 2d 594.

We have examined appellant's cases and in each one of them the decision is based on the rule that negligence in the choice of materials or application must be shown, or the proof does not measure up to that existing here.

Typical of the cases cited by appellant are Vaughn v. Montgomery Ward 95 Cal. App. 2d 553, 213 Pac. 2d 417 and Hanson v. Lincoln First Federal Savings and Loan Ass'n. 45 Wash. 2d 577, 277 Pac. 2d 344.

In the Vaughn case the court says, "There is no evidence that the floors were recently oiled or waxed." Further, since plaintiff claimed she fell on a spot of oil that defendant had not put on the floor she had to show defendant knew of its presence and this she did not know.

The Vaughn decision cites as the law the Nicola decision. It does not overrule it.

In the Hanson case the floor, in the language of the court, "had not received a new application of wax for eight days before the accident." The clear inference is that if it had, the jury could have found negligence.

How the case of Scribner v. Bertmann, 129 Cal. App. 2d 204, 276 Pac. 2d 697 has any relevancy, we cannot see. The trial court let the case go to the jury which held for defendant on the facts. The most the case does is to indicate the doctrine of res ipsa loquitur should apply in slip and fall cases.

SPECIFICATIONS OF ERROR III and IV.

The Verdict Is Not Against the Clear Weight of the Evidence

What has been said as to the evidence and the rule of the Nicola and Cagle decisions covers appellee's argument that a new trial should have been granted on this specification on the question of negligence. Judge Murray carefully considered the evidence, found the verdict was not contrary to its clear weight and in his discretion determined that it was not necessary to grant a new trial to prevent a miscarriage of justice. Appellant admits that under the Nicola and Cagle decision the evidence does support the verdict and that the verdict is not under these decisions, against the clear weight of the evidence. Appellant's brief 53, 54.

THE VERDICT IS NOT EXCESSIVE

Again the appellant complains in this section of its brief about the instructions. In its brief at page 55 it says,

No instruction on the "criterion to be used in determining loss of future earnings was given." Appellant did not object because no such instruction was given.

The instruction in point is found at transcript, page 402. The Court after charging that if the jury found for plaintiff it must fix the damages for various items, says the jury shall determine:

> "3. The reasonable value of time lost, if any, from employment by the plaintiff since her injury wherein she has been unable to resume her occupation. In determining this amount, you should consider evidence of the plaintiff's earning capacity, her earnings, and the manner in which she ordinarily occupied her time before the injury, and find what she was reasonably certain to have earned in the time lost had she not been disabled, if you find she is so disabled. If you should find that the plaintiff's power to earn money has been so impaired by the injury in question that she will suffer a loss of earning power in the future from that impairment, then you will award her such sum as will compensate her reasonably for such future detriment as she is reasonably certain to suffer. Even if a person was not gainfully employed at the time of the alleged wrongful conduct whereby she was injured, if a partial or total disability resulting from such injury is reasonably certain to continue for any period of time in the future, the

person, nevertheless, could suffer pecuniary loss, then, from the disability."

The complaint seeks $45,000.00 for permanent loss of wages and earning capacity (Tr. 5). Appellant admits that appellee proved earning capacity of $78.00 per week and estimates that $20,851.50 is the amount the jury allocated to loss of future earnings or earning capacity. This is less than one-half the amount claimed. In order to have earned $20,851.50 at a wage of $78.00 per week, appellee would have to work 267 weeks or 5 years. An award which contemplates such a short life expectancy could hardly be said to indicate that in fixing damages the jury was actuated by passion or prejudice.

Chenoweth v. Great Northern Ry. Co. 50 Mont. 481, 487, 148 Pac. 330 is cited by appellant in support of the proposition that, absent evidence as to the mortality table, the award of damages for future loss of earnings capacity may not stand. The decision is not authority for this proposition. The basis for the decision in the Chenoweth case is that the amount awarded for loss of earning capacity invested at four percent (4%) would return throughout the plaintiff's life time more than his proven earnings and the $25,000.00 would still remain to be distributed to his heirs at his death. Further,

"though the trial court submitted 29 instructions, some of which of necessity were involved and demanded painstaking consideration, the jury returned this verdict for $25,000.00 within thirty minutes from

> the time the case was submitted to them. The trial court, determined that the verdict is excessive and plaintiff acquiesced in that conclusion by offering to remit $10,000.00 from the amount."

Upon these facts the Court determined that the jury verdict was based upon passion and prejudice. The jury in the instant case was out for many hours, and even came back for further instruction. (Tr. 407).

Instead of the rule being in Montana that courts may not take judicial notice of the standard mortality table, the rule is otherwise. In McNair v. Berger, 92 Mont. 441, 458, 15 Pac. 2d 834, the Montana Court says:

> "The American Table of Mortality is a standard table, of the contents of which the courts will take judicial notice."

Appellant itself has very properly called the court's attention to American Legion Post No. 90 v. First National Bank and Trust Company (CA 2d, 1940) 113 F. 2d 898 and 5 Moore's Federal Practice 1343 sec. 4309. The holding in the American Legion Post No. 90 case is that,

> "it seems * * * that while an appellate court is not obligated to notice matters not brought to the attention of the trial court, * * * yet it may take such notice where necessary either to affirm, or to show the impropriety of, a decision below."

Mildred Murphy was fifty years old at the time this cause was tried. The Commissioners 1941 Standard Ordi-

nary Mortality Table in use by all insurance companies, give the life expectancy of a person at age fifty as 21.87 years. The testimony of appellee beginning at page 52 shows that she had an excellent employment record, having worked 27½ years in one establishment, that her prospects for future employment were excellent, that she had considerable seniority in the union, that up until the time of the accident she had no difficulty carrying heavy trays or doing any of the most difficult work in connection with her employment and that she would be employable for many years to come. All of the evidence taken together establishes without question that the award for loss of further earnings or for destruction of earning capacity, far from demonstrating passion and prejudice, shows the most conservative approach by the jury.

The case of Southern Pacific Co. v. Guthrie (CA 9th) 180 F. 2d 295, 186 F. 2d 932, cited by appellant in opinions written by Judge Pope, considers and disposes of every argument made by appellant on the question of the size of the verdict. There the plaintiff was a railroad man almost 59 years old. His proven earning capacity exceeded appellee's by only $1,200.00 per year. The award in that case for loss of future earnings approximated $70,-000.00. To arrive at that f,gurei the effect of income taxes in reducing the earnings had to be eliminated. In exhaustive opinions covering the power of the appellate court to overrule the action of the trial court in denying a new

trial, the court sustained the verdict. We close this brief with the following quotations from the decision on rehearing in that case.

> "The record contains no proof of any appeal to passion and prejudice, which, under some authorities would be essential before such a conclusion could be reached. Larsen v. Northwest Railway Co., 7 CA 171 F. 2d 841, 845. And even if an imputation of passion and prejudice could arise from the mere size of the verdict this case does not fall into any such category."

The court concludes:

> "We cannot here reverse the action of the trial court unless the verdict can be said to be 'grossly excessive' or as stated in the Affolder case, 'monstrous'."

CONCLUSION

Appellee respectfully submits the motions were properly denied and the judgment should be affirmed.

Respectfully submitted,

Attorney for Appellee.

No. 16,649

IN THE

United States
Court of Appeals

For the Ninth Circuit

MILDRED MURPHY,
Plaintiff and Respondent,

-vs-

SAFEWAY STORES, INC.,
Defendant and Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

APPELLANT'S REPLY BRIEF

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Filed March....., 1960

....., Clerk

FILED

McKee Printing Co. Butte, Montana

MAR 21 1960

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SUBJECT INDEX

TABLE OF CASES AND TREATISES

TABLE OF CASES AND TREATISES (Continued)

TREATISES

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---

a) Plaintiff's Challenges to Appellant's Statement of the Case.

Plaintiff challenges appellant's statement of the case on two grounds:

First, she states that the defendant is incorrect in stating at page 2 of the brief that the plaintiff put in the evidence of her case in chief in the belief that res ipsa loquitur was relevant. It is not the appellant but the plaintiff who is incorrect. She has apparently overlooked her statements to the court at pages 182 and 183 of the printed Transcript and her oral argument to the trial court in opposition to defendant's Motion for Directed Verdict made at the close of her case in chief. Such argument was included in the typewritten Tran-

script of Evidence, (Page 222, Line 15 to Page 225, Line 20) in the Record on Appeal (Tr. 409) but was not specified for printing by either party and is therefore affixed hereto in relevant part as Exhibit "A" for the convenience of the court. Not only was res ipsa loquitur urged as being relevant, but two of the cases (*Chase -vs- Parry* (Okl. 1958) 326 P. (2d) 809 and *Baker -vs- Mannings, Inc.*, 122 CA (2d) 390, 265 P. (2d) 96 (1953) upon which plaintiff now heavily relies were then characterized as applying that doctrine.

Secondly, plaintiff challenges appellant's statement (Def. Br. 2) that the *Cagle* doctrine specified by the trial court as the "law of the case" represents one side of a split of authorities in California's intermediary appellate courts. She makes no criticism or attack upon appellant's careful analysis of the *Cagle* and *Vaughn* cases at pages 43 - 51 of its initial brief. The *Cagle* case was from California's Fourth District Court of Appeals and the *Vaughn* case from California's Second District Court of Appeal. It isn't apparent how the conflict itself can be seriously questioned. Perhaps it is the plaintiff's contention that the *Cagle* doctrine represents the California rule as opposed to the *Vaughn* case. But that is not so. Except for the fact that the *Vaughn* case is supported by the majority rule elsewhere, and should be controlling here, neither intermediate appellate court decision would be more persuasive than the other to a Federal Court sitting *in California*, and, a fortiori, neither should be relied upon by a Federal Court in Montana as representing anything more than what appellant characterized it—i.e., one side of a split of inferior courts in California:

"This (federal) court is no more bound to follow a decision of a District Court of Appeal (in California) than is the court of last resort of the state. (California) Our position here, in a case where the point at issue has not been decided by the highest California court. (citing *Erie -vs- Tomkins*) is that we have been substituted for the California Supreme Court as the appropriate court of appeal, and that it is our duty to apply the California law as the Supreme Court of the state would apply it on appeal there. (citation) In the performance of that function we may regard the decision of an intermediate appellate court as persuasive, but it is not controlling." (parenthetical inserts added)

Six Companies -vs- Joint Highway Dist. No. 13, (CA 9th, 1940) 110 F. (2d) 620, 626.

Certainly if a Federal Court in California would view each of these District Court of Appeals authorities as persuasive but not controlling, a Federal Court in Montana is not in a position to accord greater weight to such intermediate court.

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b) Plaintiff's Response to Appellant's First and Second Specifications of Error.

Plaintiff has refused to meet the import of appellant's First and Second Specifications of Error! She commences her response thereto at page 3 of her brief by saying that "appellant seeks by this (first) specification to put the trial court in error for giving instructions to which appellant made no objection. This it may not do", citing Federal Rule 51. That analysis of appellant's position is patently not true and wholly fails to meet appellant's fair challenges of error! There is nothing in appellant's brief that suggests error in the two instructions in question. In fact a whole section of it (pp. 17-21)

is devoted to showing their accuracy under Montana law and the general rule elsewhere. Plaintiff implies that the instructions may somehow have been erroneous (Pl. Br. 4) but that irrespective of such error they became the law of the case. But she in no-wise indicates what the error was or what defendant's objection should have been.

Appellant submits that its first two Specifications of Error are clear enough. They do not challenge the giving of erroneous instructions. They simply make the challenge that the trial court erred at the time of rendering final judgment in abandoning the true law of the case and the *Erie* mandate and overruling defendant's pending motions by applying the standard of an unauthorized minority rule.

Such specified error is embodied in the trial court's final judgment and this appeal was properly perfected therefrom. Rule 51 has no applicability! No error has been waived or is beyond challenge. The specifications are succinct and clear and if plaintiff has a response in support of the trial court's position, the errors should be fairly met for this appellate court by pertinent argument and authorities.

But plaintiff has refused to recognize or meet the issues of law so specified. It is not a sufficient answer to say that the questioning of such error is foreclosed under Federal Rule 51. Nor does it appear that the challenges are met by baldly stating that because some unspecified objection was not made at some unspecified time, the impact of *Erie -vs- Tompkins* and the Rules of Decision Act need not be considered. (Pl. Br. 7) It is not an answer to state without citation that by noting the

Nicola case on her tendered instruction No. 8, the defendant was somehow thereby put on notice that the mandate of *Erie -vs- Tompkins* was being abandoned—especially when no attempt is made anywhere in her brief to challenge or contest appellant's analysis of the actual *Nicola* ruling (Def. Br. p. 43, 44) or the complete consistency of Instruction No. 8 with applicable and controlling Montana law. (Def. Br. 17, 18) Certainly the mere notation on a sound statement of Montana and general law of an authority also supporting the same is not the predicate for an objection to such instruction.

But plaintiff's brief contains no other response to the first two Specifications of Error except a serious misstatement at page 7 which must be corrected. Leading up to that and by way of preface to a study of Defendant's Instruction 12 and its amendment, plaintiff stated at page 6 of her brief that the appellant's position throughout its brief is that the appellee had to prove that the defendant was negligent in the selection and application of the floor dressing. No fair study of appellant's brief supports that statement, and it wholly ignores the special section of the brief at the bottom of page 42 and page 43 distinguishing that body of law as being as far out of line in one direction with the majority rule as the *Cagle* doctrine is out of line in the other. Also it ignores the declaration appearing again and again through appellant's brief that what plaintiff was obligated to prove as a condition precedent to the establishment of a prima facie case, and what she wholly failed so to prove, was the existence of a dangerously slippery floor condition at the time and place of the accident.

But irrespective of such clear propositions in appellant's brief, the respondent made the foregoing statement and then followed it at page 7 with a purported quotation of defendant's tendered instruction both before and after amendment. Such quotation is incorrect, misleading and highly prejudicial. Plaintiff there states that as tendered, Defendant's Instruction 12 read:

> "A store owner, such as Safeway in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is negligent in the materials he uses for the treatment or the manner of applying them."

But there is certainly no more fundamental issue in this case than that the plaintiff is plainly mistaken as to what the instruction as tendered actually was and what the amendment was! The point was very carefully and accurately covered at page 20 of appellant's brief which should be compared with the quotation at page 7 of plaintiff's brief and pages 13 and 399 of the printed Transcript. It will then be seen that the instruction as tendered closed with the phrase shown below in italics:

> "A store owner, such as Safeway in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is negligent in the materials he uses for the treatment or the manner of applying them, *so that thereafter the floor is not reasonably safe for its intended use by the customers in the store.*"

And the only amendment was the addition before the italicized portion of the phrase "or the creation of a dangerously slippery condition." The significance under Montana

law of the instruction before and after amendment is considered in detail at pages 19-22 of Appellant's Brief to which plaintiff makes no challenge. And see also in those regards the recent case of *De La Croix -vs- Sanders,* ..... Ore....., 347 P. (2d) 966 (1959). It is therefore certainly important that the misstatement at page 7 of plaintiff's brief as to the extent of the amendment be clearly appreciated.

---

c) Weight to Be Given California Cases.

Finally at page 8 of her Brief the plaintiff suggests without citation of authority that the Montana Supreme Court would determine and apply California law rather than the majority rule or the rule of the weight of authority across the country as it is variously described. That statement ignores without argument or citation appellant's argument and citations on the point at pages 13 and 14 of its brief and the additional case of *Robinson -vs- F. W. Woolworth Co.,* 83 Mont. 431, 261 Pac. 253 (1927) citing and applying the general rule. It also assumes that the California rule is that of *Cagle* rather than *Vaughn* contrary to the careful study of the cases made at pages 43 - 50 of appellant's brief. And it completely ignores the rule of *Six Companies -vs- Joint Highway Dist.* No. 13, (CA 9th, 1940) 110 F. (2d) 620, 626, supra page 3, to the effect that a Federal Court in California and *a fortiori* in Montana is not bound by any intermediate California Court decision.

d) Specification of Error III.

The plaintiff makes no contest of defendant's definition of the majority rule commencing at page 23 of its brief or of defendant's analysis of the conflicting minority rule of *Nicola* et al commencing at page 43. And so plaintiff "hangs her hat" on the propriety of the trial court's adopting such minority rule as the standard against which the sufficiency of the evidence is to be tested. Pl. Br. 8, 9) Plaintiff is thus making her response to the third specification of error wholly dependent upon how the appellate court rules on the first two specifications of error.

There are, however, certain portions of plaintiff's argument in this portion of her brief to which defendant would like to respond in shot-gun fashion:

While plaintiff heavily relies upon the potential characterization of janitor Rodoni's system of waxing as negligent, she does not make any argument or cite any authority as to how such courtroom demonstration proves or tends to prove the existence of a dangerously slippery condition *at the time and place of the accident*. Nor is the remarkable safety record established by that very system in anywise controverted.

Plaintiff relies on the *Allen -vs- Matson Navigation* case (Pl. Br. 12) as authority for the proposition that from the accident itself a jury could infer the existence of a dangerously slippery condition. The case does not so hold and the trial court here was careful to limit the case in precisely the same way that the Hon. Judge Pope who wrote the opinion limited it. Thus the *Allen* case is authority that from a fall a jury could infer that it was

one of slipping rather than tripping. And the trial court here carefully limited the holding to that point.

> "Likewise in this case, while the mere fact that Miss Murphy fell would be no evidence of why she fell, the manner in which she fell has considerable significance, and indicates that hers was a slipping fall."
>
> (Tr. 16, 17)

But the plaintiff states that from the manner of plaintiff's fall an inference of the existence of a dangerously slippery floor condition can be made. No authority can be cited for that proposition! Plaintiff is seeking to prove the existence of a dangerously slippery condition from the happening of the accident itself. It is an assertion that res ipsa loquitur is applicable and flies in the face of settled law across the entire country!

> 63 A. L. R. (2d), 635, Annotation, "Slippery Floor—Injury" section 11.

At page 13 of her brief plaintiff apparently challenges appellant's statements at pages 28 - 35 of its brief that there was not a single shred of evidence anywhere in the record that any wax whatsoever had built up anywhere in the store when Miss Murphy fell and more particularly that any had built up at the time and place of her fall, and that plaintiff didn't fall in some little-traveled or unusual spot. Appellant respectfully re-asserts its basic contention on those points and that there was absolutely no proof whatsoever of the existence of a dangerously slippery floor condition! Aside from plaintiff's description of the floor as very shiny and the happening of the accident itself which, of course, are no proof whatsoever,

the record contains only eye witnesses' testimony wholly rebutting the alleged slippery condition. Appellant stands on its statements of what the record contains and submits the controversy to the court.

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e) Plaintiff's Additional Authorities Distinguished

In addition to the authorities cited by the trial court and analysed and considered in appellant's opening brief, the plaintiff cites the following cases which appellant submits follow the general rule and are not authority for the *Cagle* et al ruling.

Western Union -vs- Blakely, 162 Miss. 859, 140 So. 336 (1932)

(Not a waxing case. Conflict of fact as to whether floor was wet and dangerously slippery from recent mopping.)

Moore -vs- Great Atlantic & Pacific Tea Co., 230 Mo. App. 495, 92 S.W. (2d) 912, (1936)

(Plaintiff slipped on floor that had been mopped in mid-day with water containing "Climalene" which made the water very slippery. Water and climalene still on the floor and plaintiff continued to slip after the fall and when she tried to get up.)

Ten Ball Novelty and Manufacturing Co. -vs- Allen, 255 Ala. 418, 51 So. (2d) 690 (1951)

(Real heavy coat of wax applied in initial treatment of new floor and floor made "real slick" and then the floor was negligently cluttered with excelsior shreds. Court said at page 693: "The slick condition of the floor and the presence of paper on the floor was sufficient to present a jury question as to whether defendants exercised reasonable care to have the floor in a reasonably safe condition.")

Shipp -vs- 32nd St. Corp., 30 N.J.L. 518, 33A. (2d) 852 (1943)

(Examples there of other slips on the floor and of the dangerously slippery condition having been called to manager's attention considerably before occurrence of accident in question.)

The plaintiff also cites the case of *Gill -vs- Meir and Frank Co.,* 208 Ore. 536, 303 Pac. (2d) 211 (1956); however, it quite apparently is a mis-citation by her, for the plaintiff was there non-suited and the non-suit affirmed. As to the latest expression of the Oregon rule appellant respectfully cites to court and counsel the case of De La Croix -vs- Sanders, ...Ore....., 347 P. (2d) 966 (1959) which is an unexplained fall on a waxed floor case precisely in point and against plaintiff's contentions here and wholly consonant with the majority rule across the country upon which appellant relies.

Taylor -vs- Northern States Power Co., 196 Minn. 22, 264 N.W. 139 (1935)

(The floor was described as being "like grease" and had excessive water upon it and against which the use of rubber matting or rugs would have protected.)

O'Conner -vs- J. C. Penney Co., 211 Minn. 602, 2 N.W. (2d) 419 (1942)

(Proof adduced of an accumulation of dirty, greasy-looking substance on the floor where the plaintiff slipped and which stuck to her hands as she got up. Her foot left a foot long streak where it slid. It was shown that the plaintiff hadn't followed the manufacturer's directions in applying the floor dressing.)

Gray -vs- Fitzgerald and Platt, 144 Conn. 57, 127 A. (2d) 76 (1956)

(Not possible to tell what happened. No facts are

given other than that the floor was so dangerously slippery that the plaintiff's son could slide or apparently skate on it.)

Charles -vs- Commonwealth Motors, 195 Va. 576, 79 S.E. (2d) 594 (1954)

Plaintiff slipped on a *sloping*, terrazza ramp that was described as "very slippery" and "very slick".)

---

f) The Verdict Is Excessive Because it Includes Amounts For Items of Claimed Damage For Which No Evidence Was Produced and Amounts in Excess of What Was Pleaded.

It should be carefully noted that the ground upon which the appellant challenges the excessiveness of the verdict is: Measured by the criterion of State Court cases, the evidence is insufficient to sustain the verdict as a *matter of state* law. Appellee at no point in her brief recognizes this is the issue presented for review, and has made no substantive attack thereon. The question is not one of instructions but of the sufficiency of the evidence as measured by appropriate state law. The propostion has been unequivocally stated that a Federal Court in weighing the sufficiency of the evidence is bound by the application of state law.

Lovas -vs- General Motors Corp., (CA Ohio 1954) 212 F. (2d) 805 at 807;

Hopkins -vs- E. I. Du Pont De Nemours & Co., (CA Pa. 1952) 199 F. (2d) 930, at 932, 933.

In every case before an issue is submitted to a jury, or when a particular question is certified up on appeal, the Court must ask itself whether there is sufficient evi-

dence under appropriate state decisions upon which the issue may be submitted to the jury or upon which the verdict may be sustained. The QUANTUM of evidence and SUFFICIENCY thereof are questions of law—not fact; the scales to weigh the quantum and sufficiency of the evidence in a diversity-of-citizenship case are supplied by state substantive law. If under controlling state law the evidence is insufficient to sustain the verdict as a matter of law then the Federal Court is bound to decide in conformity with the state law.

Lovas -vs- General Motors Corp., supra, 212 F. (2d) at 807.

It has been settled beyond dispute that a Federal Court may reverse a judgment and grant a new trial upon the grounds of insufficiency of the evidence to sustain the amount of the verdict without subverting the provisions of the Seventh Amendment.

Kennon -vs- Gilmer, 131 U.S. 22, 29; 33 L.E. 110, 9 S. Ct. 696 (1888, D.C. Mont.);

Complete Auto Transit Co. -vs- Floyd, (CA 5th, 1958) 249 F. (2d) 396, 399.

To determine, therefore, whether the evidence is sufficient to sustain the verdict as a *matter of law,* the federal court must look to state court decisions for the answer. We have supplied in our opening brief at pages 61 and 62 appropriate state court decisions which make it clear that in the instant case there is insufficient evidence to support that portion of the verdict which must be attributed to loss of future earnings or earning capacity. To sustain the verdict one must either allocate $20,851.50 to unproved future loss of earnings or allow more than $10,000 to general damages contrary to the amount

specifically limited by the pleadings. Appellee makes no reference to these cases other than attempting to distinguish the *Chenoweth* case. In addition to the cases already cited we wish to draw the court's attention to the following Montana decisions holding that in each instance there was insufficient evidence to sustain the amount of the verdict:

> *Mueller -vs- Todd*, 117 Mont. 80, 158 Pac. (2d) 299 (1945);
>
> *Jewett -vs- Gleason*, 104 Mont. 63, 70-74, 65 Pac. (2d) 3, (1936);
>
> *Cline -vs- Tait*, 113 Mont. 475, 129 Pac. (2d) 89 (1942) (Medical expenses only $600.00);
>
> *Ashley -vs- Safeway Stores, Inc.*, 100 Mont. 312, 331, 47 Pac. (2d) 153 (1935) (Scaled verdict of $20,000.00 to $10,000.00).

Damages of course are for compensatory relief and must find their support in the evidence! When there is clearly no evidence to support the amount of a verdict, there is no longer involved a question of fact, but one of law which must be answered by looking to appropriate state court decisions.

> *Lovas -vs- General Motors Corp.*, supra, 212 F. (2d) at 807.

We submit that to sustain the amount of the verdict in the instant case would be tantamount to ignoring the substantive state law on the subject, and would be entering into the realm of speculation and caprice which has been whole-heartedly condemned by the Montana Supreme Court.

> *Everett -vs- Hines*, 64 Mont. 244, 262, 298 Pac. 1063, 1068, 1069 (1922).

CONCLUSION

Appellant respectfully submits that the respondent has not met appellant's specifications of error or distinguished or otherwise ruled out its authorities in support thereof, and that the same are meritorious and should result in this court's ordering the judgment reversed and judgment, n.o.v. entered for the defendant, or alternatively a new trial ordered.

Respectfully submitted,

JAMES A. POORE, JR.
ROBERT A. POORE
URBAN L. ROTH
By: ROBERT A. POORE
Attorneys for Appellant

Service of the foregoing brief admitted and three copies thereof acknowledged this 16th day of March, 1960.

/s/ Leif Erickson
Attorney for Plaintiff

EXHIBIT "A"

(TRANSCRIPT OF PORTION OF PLAINTIFF'S ORAL ARGUMENT IN OPPOSITION TO DEFENDANT'S MOTION FOR DIRECTED VERDICT.)

"MR. ERICKSON: Now, that is all I have to offer on the main point, except on the res ipsa doctrine, and I realize I am carrying the laboring oar there. However, counsel has cited an impressive array of cases, but they represent, as I recall it, about five states on the res ipsa—I may be wrong on that.

COURT: Well, the case you cite, the hospital case from California, the case itself isn't of any assistance to the Court, except as it announces Prosser's rule, I suppose, and whether or not, accepting that rule, you can establish that this is a proper case to come under that rule?

MR. ERICKSON: That's right, and I may say that the way the law is built, as the Court well knows, is for a judge to submit that the general principle applies to the facts in a given case, and apply it, and I cannot see any difference between a slip and fall case and any other, if you have the facts, and I think we have the facts. My purpose in examining the manager was to establish that people usually don't fall in his store, and that, of course, is one of first conditions of the doctrine of res ipsa, that it isn't the type of situation where you expect falls to occur, and that's established very clearly. Now, how clearly it is established in the other cases, I don't know. And then the second, of course, is that the instrumentality is under the control of whoever is sought to be charged. Certainly, that is true here; and then the third require-

ment, that the knowledge, the information is peculiarly available to the one that is sought to be charged, and the rule as stated in the Mason case and the Ybarra case and any number of cases is that you can't lay down a fixed rule. Now, it is true that they have not applied it in slip and fall cases, that is generally. We don't know what cases have not been appealed in which it may have been applied, but that makes no difference. *It seems to me that this is so clearly a case where the doctrine of res ipsa applies that the cases cited by counsel are not controlling,* and if every jurisdiction in the United States had applied the rule, I still don't think your Honor would be bound by it because if it is a case where the principle of res ipsa applies, it ought to be applied, and I think the logic of it, the rationale of it, actually they do apply it. If you look at these cases that I have cited, and the cases cited by counsel, there is a lot of skirting around the bush about whether there is any inference of negligence and a lot of what it takes to establish the case, and I think in Chase versus Perry they obviously applied the doctrine of res ipsa, and I think they did it in the Manning case, and any number of these cases, and while the Court is skirting around saying res ipsa, *they actually have applied it, and for that reason I think the doctrine does apply.* I seem to be short one authority in addition to the Ybarra case that I penciled in.

COURT: You penciled it in on the memorandum you gave me.

MR. ERICKSON: I don't seem to have a copy of that memorandum.

COURT: I forget the case now, but I read it at the time.

MR. ERICKSON: That was a case where—it was a slip and fall case, and I have penciled it in on your copy.

MR. POORE: I can tell you about the case. It was tried to the Court alone?

MR. ERICKSON: Yes.

MR. POORE: And it was specifically held that res ipsa was not applicable.

MR. ERICKSON: That was not the specific holding in that case.

MR. POORE: We apparently differ.

MR. ERICKSON: In that case there was a discussion about res ipsa and the Court did not apply it, but the Court did not reject the doctrine. It in effect, in my opinion, by way of dictum said res ipsa does apply in slip and fall cases.

That's the only case I have that points in that direction, your Honor. I'll rest my argument on res ipsa—

COURT: On the principle of the rule announced by Prosser. Is there anything else you want to just shoot at me?

MR. POORE: I'll make it very brief, your Honor. In the first place, if there is any hornbook type of law, when you have a 1959 annotation 90 some pages long on slippery floors and directed at wax and oil cases, and the res ipsa loquitur doctrine is summarized as follows, 'It is universally held that the res ipsa loquitur doctrine is inapplicable in suits to recover against business proprietors for injuries sustained in falls on waxed, oiled, or similarly treated floors within the business premises'."

No. 16663

United States
Court of Appeals
for the Ninth Circuit

O. H. KRUSE GRAIN & MILLING, a corporation, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—1-18-60

No. 16663

United States
Court of Appeals
for the Ninth Circuit

O. H. KRUSE GRAIN & MILLING, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Respondent.

The Tax Court of the United States

Docket No. 65683

O. H. KRUSE GRAIN & MILLING,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Ap: LA:AA-DRR 90-D - ICA) dated October 29, 1956, and as a basis for its proceeding alleges as follows:

1. The petitioner is a corporation, with its principal place of business located at El Monte, California. The returns for the years involved herein were filed with the District Director of Internal Revenue for the 6th District California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on October 29, 1956.

3. The deficiencies, as determined by the Commissioner are in income tax for the calendar years 1952 and 1953, in the amounts of $13,994.26 for the year 1952, and $19,192.33 for the year 1953, all of which is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors.

(a) The Commissioner erred in failing to find that the petitioner was indebted to O. H. Kruse in the principal sum of $200,000. (two hundred thousand dollars), which indebtedness was evidenced by an interest bearing promissory note, and remained outstanding throughout the taxable years 1952 and 1953 involved herein.

(b) The Commissioner erred in failing to find that the said promissory note was issued by the petitioner to O. H. Kruse as the consideration for the transfer of certain properties by the aforesaid O. H. Kruse to O. H. Kruse Grain & Milling, the petitioner corporation involved herein.

(c) The Commissioner erred in failing to find that the said O. H. Kruse transferred to the petitioner corporation, for no stated consideration, the good will of the business previously built up by him; valuable contracts with various large groups of poultry producers; the benefits which could be expected from his friendly relations with the dairy companies which had furnished a substantial portion of the gross income of his former successful business, and commitments for purchases of grain at exceptionally favorable prices.

(d) The Commissioner erred in failing to find that the fair market value of the intangible assets transferred to the petitioner corporation for no stated consideration, was not less than $200,000., (two hundred thousand dollars).

(e) The Commissioner erred in failing to find that the interest on the promissory note involved herein, which was issued by the petitioner to O. H. Kruse, in the principal sum of $200,000.00 was paid to, or constructively received by O. H. Kruse during each of the taxable years 1952 and 1953, which are involved herein.

(f) The Commissioner erred in failing to find that the said O. H. Kruse reported the receipt of $12,000.00 (twelve thousand dollars) in his federal income tax returns for each of the taxable years 1952 and 1953 involved herein, as interest on the petitioner's note.

(g) The Commissioner erred in failing to find that the petitioner was indebted to O. H. Kruse for the payment of rental for the use of leased real estate, in the sum of $12,000.00 (twelve thousand dollars) for each of the taxable years 1952 and 1953.

(h) The Commissioner further erred in failing to find that the rental payments in the amount of $12,000.00 owing to the said O. H. Kruse for each of the taxable years 1952 and 1953, were paid to, or constructively received by O. H. Kruse in each of those years.

(i) The Commissioner erred in failing to find that O. H. Kruse reported the amount of $6,000.00 (six thousand dollars) for the year 1952, and $12,000.00 for the year 1953, in his federal income tax returns for those years, as rental income received from the petitioner.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner is a corporation organized on

March 27th, 1950, under the laws of the State of California, to take over a business previously conducted by O. H. Kruse for many years prior thereto, as a sole proprietorship.

(b) The statement of the assets and liabilities of the business formerly conducted by O. H. Kruse, as shown on the books of account of the sole proprietorship, at March 31, 1950, discloses the following:

ASSETS:			
Current Assets:			
Cash in bank			$ 42,681.22*
Cash on hand			2,937.41
Accounts Receivable			139,506.62
Inventory			37,724.59
Total Current Assets			$222,849.84
Fixed Assets:	Cost	Reserve for Depreciation	
Land and buildings	$ 35,179.85	$10,767.74	
Machinery	64,113.91	20,377.65	
Automobiles & trucks	57,135.27	23,257.71	
Office equipment	1,865.76	415.05	
Total	$158,294.79	$54,818.15	103,476.64
Prepaid Expenses			6,457.15
Total Assets			$332,783.63
LIABILITIES:			
Current Liabilities:			
Accounts Payable			$ 1,710.00
Accrued Payroll Taxes			82.23
Total Current Liabilities			$ 1,792.23
Note Payable—Fred J. Schroeder			8,000.00
Total Liabilities			$ 9,792.23

* Bank balance after paying all trade accounts as of March 31, 1950.

CAPITAL:		
Capital—January 1, 1950	$291,143.51	
Add income to March 31st	39,013.70**	
	$330,157.21	
Less: Drawings	7,165.81	322,991.40
Total Liabilities and Capital		$332,783.63

(a) Under date of July 13, 1950, the said O. H. Kruse transferred his business, and substantially all of the assets employed therein, subject to its then liabilities, to a corporation organized by him under the laws of the State of California, with the name "O. H. Kruse Grain & Milling," the petitioner herein.

(b) The name, "O. H. Kruse Grain & Milling" was adopted in order to retain the use of the valuable good will which had been developed by the said O. H. Kruse, in the course of his conduct of the business as a sole proprietorship, and to reassure important large customers, of long standing, that he intended to be actively associated with the new corporation, and they could rely upon a continuance of the treatment which had been extended to them, by him, prior to incorporation.

(c) The assets listed on the statement of assets and liabilities set forth hereinabove, which were exchanged for the capital stock of the petitioner corporation, were as follows:

** Estimated federal taxes on $39,013.70—$12,500.00.

Office equipment	$ 1,865.76	
Autos and trucks	57,135.27	
Machinery and equipment	64,113.91	
	$123,114.94	
Less: Accrued depreciation	44,050.41	
		$ 79,064.53
Prepaid insurance		4,163.67
Insurance deposits less accrued premiums		2,293.48
Cash		4,270.55
		$ 89,792.23

(d) The capital stock of the petitioner corporation which was issued for the assets of O. H. Kruse totalling $89,792.23 was of the par value of $80,000.00.

(e) In addition to the above-listed assets, for which the petitioner issued its capital stock, the said O. H. Kruse transferred to the petitioner, without consideration, the good will of the business previously built up by him; valuable contracts with groups of large raisers of poultry for the sale of feed; valuable contacts with various dairy companies which furnished a large portion of his business, and commitments for purchases of grain at exceptionally favorable prices. The value of such intangible assets was not less than $200,000.00.

(f) The petitioner was not an under-capitalized corporation.

(g) The principal remaining assets of O. H. Kruse, which were not transferred to the petitioner corporation in exchange for its capital stock, consisted of the following:

Cash	$41,348.08
Accounts receivable	139,506.62
Merchandise inventory	37,724.59
	$218,579.29

As an integral part of a single transaction, and, on the same date that the other assets were transferred to the petitioner corporation in exchange for its capital stock, or as a paid in surplus, the said O. H. Kruse conveyed the above-listed assets to the petitioner corporation in exchange for its promissory note in the principal sum of $200,000.00 (two hundred thousand dollars), made payable December 31, 1950, and bearing interest at the rate of 6% per annum, in the event that it was not paid off on the said due date, and an open account due him from the petitioner in the amount of $18,579.29.

(h) Since the petitioner failed to pay its note when due, on December 31, 1950, interest was regularly accrued, and/or paid on the said note for each year commencing with January 1, 1951, and including the taxable years involved herein, 1952 and 1953.

(i) The Corporate Minutes of the petitioner contain provisions for the application of payments by it to O. H. Kruse, and state that they must first be applied against interest on the said promissory note in the principal sum of $200,000.00.

(j) Although the corporation was financially able to pay the interest due to the said O. H. Kruse for the year 1952, which had been accrued on its books, since he was not then in need of any funds for his

personal use, he did not insist on payment, which he could have done, by reason of being in control of the petitioner corporation. He did report the amount of the accrued interest as constructively received, in his federal income tax return for the year 1952, and paid the tax shown to be due thereon. Through error, he showed the receipt of $6,000.00 as interest constructively received, whereas he should have reported $12,000.00, since, as provided in the minutes of the petitioner corporation, the first payments to him were to be credited against interest, and not against accrued rental as the payments constructively received were reported in his return.

(k) In the taxable year 1953, the petitioner corporation paid interest to O. H. Kruse on its note for $200,000.00, in the amount of $12,000.00, which amount was reported as income by him, in his federal income tax return for that year.

(l) During the taxable years involved herein, 1952 and 1953, the petitioner leased certain real estate, which it regularly used in its business, from O. H. Kruse, for which it was obligated to pay an annual rental in the amount of $12,000.00 per annum. Such rental payments were regularly accrued on the books of the petitioner corporation.

(m) The petitioner did not pay O. H. Kruse the rental due him for the taxable year 1952, in cash, although it was financially able to do so, for the reason that he preferred to leave the fund with the corporation, and, being in control of its affairs, was in a position, by reason of his control of the peti-

tioner corporation, to authorize, or to withhold its payment.

(n) The said O. H. Kruse, in his federal income tax return for 1952, reported the amount of $18,000.00 as constructively received from the petitioner corporation in that year, on account of interest accrued on the petitioner's promissory note involved herein, computed at the rate of 6% per annum, and rental in the sum of $6,000.00. Such payments were erroneously designated by him as the payment of interest to the extent of $6,000.00, and rental income in the sum of $12,000.00, whereas he should have shown the amount of $12,000.00 as the receipt of interest, and $6,000.00 as rental received, in accordance with the requirements contained in the petitioner corporation's minutes.

(o) In the taxable year 1953, payments in cash totalling the sum of $14,000.00 were paid to O. H. Kruse by the petitioner, on account of accrued interest on the promissory note involved herein, and the payment of rent. As a result of a bookkeeping error, the amount of $2,000.00 was entered on the books as a payment of interest on the said note, and $12,000.00 as a payment of rental. In conformity with the instructions given in the minutes of the petitioner corporation, the payment of $12,000.00 should have been recorded as a cash payment of interest, and $2,000.00 as a cash payment of rental.

(p) The said O. H. Kruse, in his income tax return for the taxable year 1953, reported the receipt of interest on the promissory note issued by the petitioner which is involved herein, in the amount

of $12,000.00, and rental income received from the petitioner in the sum of $12,000.00, and paid the tax shown to be due thereon.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that there is no deficiency in federal income tax due from the petitioner for the taxable years 1952, or for the taxable year 1953.

[Seal] O. H. KRUSE GRAIN & MILLING,
/s/ By O. H. KRUSE,
President.

Duly Verified.

EXHIBIT "A"

U. S. Treasury Department
Internal Revenue Service

Regional Commissioner
1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

October 29, 1956

In replying refer to Ap:LA:AA-DRR 90-D:ICA.

O. H. Kruse Grain & Milling
c/o Fray L. Hobson
3750 West Sixth Street
Los Angeles 5, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended De-

Exhibit "A"—(Continued)

cember 31, 1952 and December 31, 1953 discloses deficiencies in tax aggregating $33,186.59, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Rm. 1250, 417 South Hill St., Los Angeles, California. The signing and filing of this form will expedite the closing of your case by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after the re-

Exhibit "A"—(Continued)

ceipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

RUSSELL C. HARRINGTON,
Commissioner,

By H. L. DUCKER,
Associate Chief, Appellate Division.

Enclosures: Statement, IRS Pub. No. 160, Agreement Form.

Ap:LA:AA-DRR
90-D:ICA

STATEMENT

O. H. Kruse Grain & Milling
c/o Fray L. Hobson
3750 West Sixth Street
Los Angeles 5, California

Tax Liability for the Taxable Years Ended December 31, 1952 and December 31, 1953.

Year	Income Tax Liability	Assessed	Deficiency
1952	$ 64,178.49	$50,184.23	$13,994.26
1953	66,814.18	47,621.85	19,192.33
Totals	$130,992.67	$97,806.08	$33,186.59

In making this determination of your income tax liability, careful consideration has been given to the report of examination forwarded to you April 23, 1956, to your protest dated June 6, 1956, and to the statements made at the conferences held July 6, August 6, and September 5, 1956.

A copy of this letter and statement has been mailed to your representative, Mr. Oliver R. Mills, 1093 Broxton Avenue, Los Angeles 24, California, in accordance with the authority contained in the power of attorney executed by you.

Exhibit "A"—(Continued)

Adjustments to Net Income

Taxable Year Ended December 31, 1952

Net income as disclosed by return	$ 91,836.06
Unallowable deductions:	
(a) Interest expense disallowed	12,000.00
(b) Rent expense disallowed	12,000.00
Net income adjusted	$115,836.06

Explanation of Adjustments

(a) The deduction in the amount of $12,000.00, which was claimed as interest expense on your return for each of the taxable years 1952 and 1953, is disallowed. It has been determined that no indebtedness exists within the meaning of section 23(b) of the Internal Revenue Code of 1939. It is further held that these amounts were not paid during the taxable years 1952 and 1953 or within two and one-half months following the close of the taxable years, pursuant to the provisions of section 24(c) of the Internal Revenue Code of 1939.

(b) The deduction in the amount of $12,000.00, which was claimed as rental expense on your returns for each of the taxable years 1952 and 1953, is disallowed. These amounts were not paid during the taxable years 1952 and 1953 or within two and one-half months following the close of the taxable years, in accordance with the provisions of section 24(c) of the Internal Revenue Code of 1939.

Adjustments to Excess Profits Net Income

Taxable Year Ended December 31, 1952

Excess profits net income as disclosed by return		$106,698.74
Additions:		
(a) Interest expense disallowed	$12,000.00	
(b) Rent expense disallowed	12,000.00	24,000.00
Total		$130,698.74
Deduction:		
(c) Adjustment for interest on borrowed capital		12,651.97
Excess profits net income adjusted		$118,046.77

Exhibit "A"—(Continued)

Taxable Year Ended December 31, 1952—(Continued)

Explanation of Adjustments

(a) and (b) These adjustments have been explained above.

(c) The adjustment for interest on borrowed capital is recomputed as follows:

Average daily borrowed capital in 1952		$ 60,110.73
Borrowed capital at beginning of first excess profits tax year—March 28, 1950		8,000.00
Increase		$ 52,110.73
75% of increase		39,083.05
Ratio of 75% of increase to average daily borrowed capital in 1952		65.02%
Interest paid on borrowed capital:		
Interest expense per return	$14,862.68	
Add: Interest income applied as offset	537.37	
Total interest expense	$15,400.05	
Less: Interest disallowed herein	12,000.00	
Interest paid on borrowed capital	$ 3,400.05	
Adjustment for interest on borrowed capital (65.02% of $3,400.05)		$ 2,210.71
Adjustment for interest on borrowed capital per return		14,862.68
Decrease		$ 12,651.97

Income and Excess Profits Tax Computation

Taxable Year Ended December 31, 1952

Income Tax

Net income	$115,836.06
Combined normal tax and surtax (52% less $5,500.00)	54,734.75

Excess Profits Tax

Excess profits net income	$118.046.77
Excess profits credit, Exhibit A	81,897.56
Adjusted excess profits net income	$ 36,149.21
30% of adjusted excess profits net income	$ 10,844.76
18% of excess profits net income	$ 21,248.42

Exhibit "A"—(Continued)

Income and Excess Profits Tax Computation—(Continued)

Taxable Year Ended December 31, 1952—(Continued)

New corporation—3rd year (8% of excess profits net income)	$ 9,443.74
Excess profits tax (smallest of above amounts)	$ 9,443.74
Income tax	54,734.75
Total tax liability	$ 64,178.49
Total tax previously assessed, Account No. CI 862 Los Angeles District	50,184.23
Deficiency	$ 13,994.26

Adjustments to Income

Taxable Year Ended December 31, 1953

Net income as disclosed by return	$ 93,701.73
Unallowable deductions:	
(a) Interest expense disallowed	12,000.00
(b) Rent expense disallowed	12,000.00
Net income adjusted	$117,701.73

Explanation of Adjustments

(a) and (b) These adjustments have previously been explained above.

Adjustments to Excess Profits Net Income

Taxable Year Ended December 31, 1953

Excess profits net income as disclosed by return		$104,878.33
Additions:		
(a) Interest expense disallowed	$12,000.00	
(b) Rent expense disallowed	12,000.00	24,000.00
Total		$128,878.33
Deduction:		
(c) Adjustment for interest on borrowed capital		11,140.89
Excess profits net income adjusted		$117,737.44

Exhibit "A"—(Continued)

Taxable Year Ended December 31, 1953—(Continued)

Explanation of Adjustments

(a) and (b) These adjustments have previously been explained above.

(c) The adjustment for interest on borrowed capital is recomputed as follows:

Average daily borrowed capital in 1953	$ 10,000.00
Borrowed capital at beginning of first excess profits tax year—March 28, 1950	8,000.00
Increase	$ 2,000.00
75% of increase	1,500.00
Ratio of 75% of increase to average daily borrowed capital in 1953	15.0%
Interest paid on borrowed capital	$ 238.07
Adjustment for interest on borrowed capital (15.0% of $238.07)	$ 35.71
Adjustment for interest on borrowed capital per return	11,176.60
Decrease	$ 11,140.89

Income and Excess Profits Tax Computation

Taxable Year Ended December 31, 1953

Income Tax	
Net income	$117,701.73
Combined normal tax and surtax (52% less $5,500.00)	$ 55,704.90
Excess Profits Tax	
Excess profits net income	$117,737.44
Excess profits credit, Exhibit A	80,706.50
Adjusted excess profits net income	$ 37,030.94
30% of adjusted excess profits net income	$ 11,109.28
18% of excess profits net income	$ 21,192.74
New corporation—4th year (11% of excess profits net income)	$ 12,951.12
Excess profits tax (smallest of above amounts)	$ 11,109.28
Income tax	55,704.90
Total tax liability	$ 66,814.18
Total tax previously assessed, Account No. CI 395, Los Angeles District	47,621.85
Deficiency	$ 19,192.33

Exhibit "A"—(Continued)

Exhibit "A"

EXCESS PROFITS CREDIT—BASED ON INCOME

Taxable Years Ended December 31, 1952 and December 31, 1953.

Average Base Period Net Income—Based on Growth:

1. Date of commencement of business		1935	
		Total Payroll	Gross Receipts
2. (a) Last half of base period		$184,485.50	$3,668,022.12
(b) First half of base period		$138,834.14	$2,779,488.97
(c) Percentage which (a) is of (b)		133%	132%
3. Excess profits net income for last 24 months of base period			$ 90,384.16
4. One-half of line 3			$ 45,192.08
5. Excess profits net income for last 12 months of base period			$ 47,271.15
6. Weighted excess profits net income for first 6 months of 1950			$ 57,104.16
7. Excess profits net income for last 6 months of 1949			$ 23,635.56
8. Line 6 plus line 7			$ 80,739.72
9. Average base period net income based on growth (highest of lines 4, 5 or 8)			$ 80,739.72
Excess Profits Credit:		1952	1953
10. Line 9 x 83%		$67,013.97	$67,013.97
11. 12% of net capital addition, Exhibit B		14,883.59	13,692.53
12. Excess profits credit based on income		$81,897.56	$80,706.50

Exhibit "A"—(Continued)

Exhibit "B"

TAXABLE YEAR CAPITAL ADDITIONS

Taxable Years 1952 and 1953

	1952	1953
1. Equity capital beginning of first taxable year ending after June 30, 1950 per Exhibit C	$280,000.00	$280,000.00
2. Equity capital beginning of taxable year, Exhibit C	$364,946.83	$392,604.40
3. Borrowed capital at beginning of first taxable year ending after June 30, 1950	$ 8,000.00	$ 8,000.00
4. Average daily amount of borrowed capital for taxable year	$ 60,110.73	$ 10,000.00
5. Line 2 minus line 1	$ 84,946.83	$112,604.40
6. 75% of line 4 minus line 3	39,083.05	1,500.00
7. Average daily capital addition (line 5 plus line 6)	$124,029.88	$114,104.40
8. Average daily capital reduction	0.00	0.00
9. Net capital addition	$124,029.88	$114,104.40
10. 12% of net capital addition	$ 14,883.59	13,692.53

Exhibit "C"

EQUITY CAPITAL AT BEGINNING OF YEAR

Taxable Years 1950, 1952 & 1953

Assets at April 1, 1950:		
Cash	$ 45,618.63	
Accounts Receivable	139,506.62	
Merchandise Inventory	37,724.59	
Office Equipment	1,450.71	
Autos and Trucks	33,877.56	
Machinery and Equipment	43,736.26	
Prepaid Insurance	4,163.67	
Insurance Deposits	2,293.48	$308,371.52

Exhibit "A"—(Continued)

Equity Capital At Beginning of Year—(Continued)

Taxable Years 1950, 1952 & 1953—(Continued)

Liabilities:		
Notes Payable (Bank)	$ 8,000.00	
Accounts Payable	1,710.00	
Accrued Payroll Taxes	82.23	
Accounts Payable—Officer	18,579.29	28,371.52
Equity capital at April 1, 1950		$280,000.00
Assets per books at January 1, 1952	$494,348.74	
Add: Incorporation costs	401.09	$494,749.83
Liabilities per books	$325,472.20	
Add: California Franchise tax (1950)	380.04	
Federal income tax deficiency (1950)	3,950.76	
Total	$329,803.00	
Less: Note of O. H. Kruse	200,000.00	129,803.00
Equity capital at January 1, 1952		$364,946.83
Assets per books at January 1, 1953	$549,277.45	
Add: Incorporation costs	401.09	$549,678.54
Liabilities per books	$338,749.08	
Add: California Franchise tax (1950)	380.04	
Federal Income tax deficiency (1950)	3,950.76	
Federal income tax deficiency (1952)	13,994.26	
Total	$357,074.14	
Less: Note of O. H. Kruse	200,000.00	157,074.14
Equity capital at January 1, 1953		$392,604.40

Served and Entered: February 4, 1957.

[Endorsed]: T.C.U.S. Filed January 28, 1957.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Nelson P. Rose, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition.

5. (a) With regard to the facts upon which the petitioner relies as the basis of this proceeding, admits the allegations contained in subparagraph (a) on Page 3 of paragraph 5 of the petition.

(b) Denies, for lack of sufficient information presently available, the allegations contained in subparagraph (b) on Page 3 of paragraph 5 of the petition.

(a) Admits that the said O. H. Kruse transferred his business, and substantially all of the assets employed therein, subject to its then liabilities, to a corporation organized by him under the laws of the State of California, with the name "O. H. Kruse Grain & Milling," the petitioner herein; denies the remaining allegation contained in subparagraph (a) on Page 5 of paragraph 5 of the petition.

(b) Denies the allegations contained in subparagraph (b) on Page 5 of paragraph 5 of the petition.

(c) through (k) Denies the allegations contained in subparagraphs (c) through (k) of paragraph 5 of the petition.

(1) Admits the allegations contained in subparagraph 1 of paragraph 5 of the petition.

(m) through (o) Denies the allegations contained in subparagraphs (m) through (o) of paragraph 5 of the petition.

(p) Admits the allegations contained in subparagraph (p) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ NELSON P. ROSE, REM,
Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, E. C. Crouter, Assistant Regional Counsel, R. E. Maiden, Jr., Special Assistant to the Regional Counsel, Joseph G. White, Jr., Attorney.

Served and Entered March 19, 1957.

[Endorsed]: T.C.U.S. Filed March 18, 1957.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted as facts; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. The petitioner is a corporation organized under the laws of the State of California on March 27, 1950.

2. The petitioner corporation had an authorized capital stock of $300,000.00, consisting of 3,000 shares, each of the par value of $100.00.

3. O. H. Kruse, president of the petitioner corporation, had been engaged in the hay, grain, and feed business for a period of fourteen years, immediately prior to the organization of the petitioner corporation.

4. The name under which O. H. Kruse conducted his business as a sole proprietorship was O. H. Kruse Grain and Milling.

5. The assets of O. H. Kruse which were transferred to the petitioner corporation in exchange for stock consisted of the following:

Office Equipment	$ 1,865.76	
Autos and Trucks	57,135.27	
Machinery and Equipment	64,113.91	
	$123,114.94	
Less accrued depreciation	44,050.41	
		$ 79,064.53
Prepaid insurance		4,163.67
Insurance deposits less accrued premiums		2,293.48
Cash		4,270.55
		$89,792.23

6. The liabilities of O. H. Kruse which were assumed by the petitioner corporation were as follows:

Notes Payable (bank)	$8,000.00
Accounts Payable (trade)	1,710.00
Accrued payroll taxes (due 12/31/50)	82.23
	$9,792.23

7. O. H. Kruse conveyed the following assets to the petitioner corporation and accepted in payment therefor its promissory note in the principal sum of $200,000.00, and an open account in his favor, in the amount of $18,579.29:

Accounts Receivable	$139,506.62
Merchandise Inventory	37,724.59
Cash	41,348.08
	$218,579.29

8. Payment of the petitioner corporation's note was made in installments as follows:

November 1, 1955	$100,000.00
April 12, 1957	20,000.00
October 22, 1958	80,000.00
	$200,000.00

/s/ LeVONE A. YARDUM,
Counsel for Petitioner.

/s/ ARCH M. CANTRALL, REM,
Chief Counsel, Internal Revenue Service, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed January 8, 1959.

T. C. Memo. 1959-110

Tax Court of the United States

O. H. Kruse Grain & Milling, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket No. 65683. Filed May 26, 1959.

MEMORANDUM FINDINGS OF FACT AND OPINION

Held, that the petitioner, in giving a promissory note to its majority stockholder, did not intend to create a true indebtedness within the meaning of section 23 (b) of the Internal Revenue Code of 1939

and consequently is not entitled to deductions for interest on such note for the years 1952 and 1953.

Held, further, that rental payments to its majority stockholder which were accrued by petitioner on its books for the years 1952 and 1953 were includible in the gross income of the payee by application of the doctrine of constructive receipt and the claimed deductions are not barred by section 24 (c), I.R.C. of 1939.

LeVone A. Yardum, Esq., for the petitioner.

John E. Schessler, Esq., and J. Earl Gardner, Esq., for the respondent.

Mulroney, Judge: The respondent determined deficiencies in the income tax of petitioner for the years 1952 and 1953 in the respective amounts of $13,994.26 and $19,192.33.

The questions in the case are:

1. Whether an alleged promissory note issued in 1950 by petitioner to O. H. Kruse, who, with his wife jointly owned all of the petitioner's outstanding stock, was a true indebtedness so that accrued interest thereon during the years 1952 and 1953 would be deductible under the provisions of section 23 (b), Internal Revenue Code of 1939;[1] and

2. Whether petitioner is barred by section 24 (c) from deducting accrued rental expense during the years 1952 and 1953.

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[1] All section references are to the Internal Revenue Code of 1939, as amended.

Findings of Fact

Some of the facts were stipulated and they are found accordingly.

Petitioner is a corporation organized under the laws of the State of California and it filed its corporate income tax returns for the years 1952 and 1953 with the district director of internal revenue at Los Angeles, California.

O. H. Kruse, sometimes referred to in the record as Otto H. Kruse, president of petitioner corporation, had been engaged in the hay, grain and feed business for a period of 14 years prior to 1950. In April 1950 O. H. Kruse and his wife, Helen D. Kruse, formed petitioner corporation, using the name O. H. Kruse Grain & Milling as the name of the corporation, which was the same name as O. H. Kruse had used in conducting his business as a sole proprietorship. The petitioner corporation had an authorized capital stock of $300,000, consisting of 3,000 shares of $100 par value each. On April 1, 1950, O. H. Kruse transferred to petitioner, in exchange for 800 shares of stock, the following property:

Office Equipment	$ 1,865.76	
Autos and Trucks	57,135.27	
Machinery and Equipment	64,113.91	
	$123,114.94	
Less accrued depreciation	44,050.41	
		$ 79,064.53
Prepaid insurance		4,163.67
Insurance deposits less accrued premiums		2,293.48
Cash		4,270.55
		$89,792.23

In this transaction petitioner assumed liabilities of O. H. Kruse, as follows:

Notes payable (bank)	$8,000.00
Accounts payable (trade)	1,710.00
Accrued payroll taxes (due 12/31/50)	82.23
	$9,792.23

The minutes of the meeting of June 15, 1950 of the board of directors of the petitioner corporation show the following:

> Mr. Kruse then stated that he had advanced funds to the corporation for working capital, and that he would be willing to accept the corporation's promissory note for $200,000.00 payable December 31, 1950, to bear interest at the rate of 6% per annum beginning January 1, 1951, if the note should be unpaid on that date. The balance of the advance could be carried as an open account. Payments to Mr. Kruse, other than those on the promissory note, should be applied first to accrued interest, secondly to accrued rental, and then to the open account.

The following resolution is also contained in these minutes:

> Resolved: That the officers of the corporation be directed to execute a promissory note in the amount of $200,000.00, payable to Mr. O. H. Kruse, payable on December 31, 1950, and to

bear interest at the rate of 6% per annum if unpaid on January 1, 1951.

O. H. Kruse conveyed the following assets to the petitioner corporation and accepted in payment therefor its promissory note in the principal sum of $200,000 and an open account in his favor in the amount of $18,579.29:

Accounts receivable	$139,506.62
Merchandise inventory	37,724.59
Cash	41,348.08
	$218,579.29

The $200,000 note was dated June 15, 1950 and it provides for the payment of the $200,000 "On or before December 31, 1950 or thereafter on demand" and it bears interest at the rate of 6 per cent "from January 1, 1951 until paid, interest payable semi-annually."

Petitioner rented certain real estate consisting of mills and a small house used as an office from O. H. Kruse for $1,000 per month and continued renting this property through the year 1953. The corporate journal entry for each month of 1952 and 1953 shows a debit to "Interest" or "Interest Expense" and a credit to "Accrued Interest." These monthly journal entries were posted to ledger sheets entitled "Accrued Interest."

The corporate journal entry for each month for 1952 and 1953 shows a debit to "Rent" or "Rental Expense" and a credit to "Accrued Rent." These

monthly journal entries were posted to ledger sheets entitled "Accrued Rent." Petitioner had a line of credit of $100,000 with the Bank of America established on November 3, 1951 and on said date O. H. Kruse and Helen D. Kruse signed a subordination agreement subordinating the $200,000 note obligation to any existing loan with the bank. In said agreement O. H. Kruse and his wife agreed not to sue, collect or receive payment upon any claim, nor interest thereon, which they held against petitioner so long as petitioner owed the bank.

Petitioner corporation deducted accrued interest of $9,000 and accrued rent of $9,000, both payable to O. H. Kruse, in 1950.

Petitioner corporation deducted $12,000 rent and $12,000 interest both payable to O. H. Kruse, and O. H. Kruse, who reported his income on the cash method of accounting at all times, reported $21,000 rent and no interest from petitioner corporation in 1951. Nothing was paid on these items in 1951.

Petitioner corporation deducted accrued rent of $12,000 and accrued interest of $12,000 both owing to O. H. Kruse in 1952. O. H. Kruse reported $12,000 rent and $6,000 interest both from petitioner in 1952. Nothing was paid on these items in 1952.

Petitioner corporation deducted accrued rent of $12,000 and accrued interest of $12,000 both owing to O. H. Kruse in 1953. O. H. Kruse reported $12,000 rent and $12,000 interest, both from petitioner in 1953.

Petitioner paid $2,000 interest in September 1953 and $12,000 rent in December 1953 to O. H. Kruse. Payment of the corporation's note to O. H. Kruse was made in installments as follows:

November 1, 1955	$100,000
April 12, 1957	20,000
October 22, 1958	80,000
	$200,000

Respondent disallowed petitioner's deductions in the amount of $12,000 for each of the years 1952 and 1953 as interest expense on the ground that no indebtedness existed within the meaning of section 23 (b) of the Internal Revenue Code of 1939 and also on the ground that these amounts were not paid during the taxable years 1952 and 1953 or within 2½ months following the close of the taxable years, pursuant to the provisions of section 24 (c) of the Internal Revenue Code of 1939.

Respondent also disallowed deductions in the amount of $12,000 in each of the years 1952 and 1953 as rental expense on the ground that these amounts were not paid during the taxable years 1952 and 1953 or within 2½ months following the close of the taxable years, pursuant to the provisions of section 24 (c) of the Internal Revenue Code of 1939.

Petitioner's note of June 15, 1950, payable to Otto H. Kruse in the sum of $200,000, was not a bona fide indebtedness of petitioner and interest accrued thereon in 1952 and 1953 was not deductible.

Petitioner was not precluded by section 24 (c) from deducting accrued rental expense in the sum of $12,000 for each of the years 1952 and 1953.

Opinion

In disallowing petitioner's deductions of interest expense in the sum of $12,000 for each of the years 1952 and 1953, respondent explained that his disallowance was based on his determination "that no indebtedness exists within the meaning of section 23 (b) of the Internal Revenue Code of 1939." Since the usual presumption of correctness, inhering in respondent's determination, applies, the burden was on petitioner to establish the existence of the indebtedness to which the claimed interest expense was related. Petitioner sought to sustain its burden by introducing the $200,000 note given to its president, who, with his wife jointly, held all of its stock, the minutes of the corporation, the books of the corporation which might be said to show accruals of interest on this note and $2,000 payment of such interest in 1953, and almost nothing more which would tend to substantiate the interest deduction.

The significant fact is that petitioner sought to establish its burden without the testimony of O. H. Kruse and there is no explanation in the record that his testimony was unavailable. The only witness in the case was Fray L. Hobson, a certified public accountant who described himself as an assistant secretary of petitioner, but actually petitioner was merely one of the clients of his accountancy busi-

ness, for whom he worked as an accountant about three days a month.

The record in this case shows that in 1950 O. H. Kruse, desiring to incorporate his grain and milling business that he had operated for 14 years as a sole proprietorship, formed a corporation with the same name as his sole proprietorship business, to which corporation he first transferred part of his business assets and received payment therefor in the form of 800 shares of stock, and to which he later transferred other business assets such as accounts receivable, stock of merchandise, and some cash in the sum of $41,348.08 and received in payment therefor the corporation's note in the sum of $200,000 and an $18,579.29 open account in his favor. The 800 shares of stock, which were issued to O. H. Kruse and his wife, jointly, were all of the issued shares and O. H. Kruse became the president of the corporation and in complete control at the time the $200,000 note was issued by the corporation to him. The question is whether the $200,000 note did, in reality, represent a bona fide indebtedness of the corporation or whether it was a contribution to capital. There have been many cases involving the issue of whether the principal stockholder of a closely held corporation succeeded in establishing a creditor-debtor relationship between himself and the corporation. See Gooding Amusement Co., 23 T.C. 408, and the affirming opinion in Gooding Amusement Co. v. Commissioner, 236 F. 2d 159, where many cases involving this issue are cited and reviewed. The issue is essentially one of fact (Tribune

Publishing Co., 17 T.C. 1228) and it is to be decided upon the facts and circumstances of the particular case (Charles L. Huisking & Co., 4 T.C. 595). Various factors and combination of factors have been relied upon in the decided cases as a basis for the determination of the issue. The inquiry is not limited to the instruments, and it has been said the real intent of the parties is the decisive factor. Gooding Amusement Co., supra; Proctor Shop, Inc., 30 B.T.A. 721.

One of the factors is the presence or absence of a fixed maturity date for the instrument, Mullin Building Corporation, 9 T.C. 350. Here the $200,000 note dated June 15, 1950 and executed by O. H. Kruse as president of the corporation in favor of himself was on the usual printed note form but in the written part it provided for payment "On or before December 31, 1950 or thereafter on demand." It appears to be a demand note with no right to make demand for about the first six months and the right to fix the maturity date by demand after December 31, 1950, given to the payee. We need not say that in all cases a demand note given to a stockholder would not evidence an indebtedness, but we think it can be said here as was said of the obligation in Gooding Amusement Co., supra:

> The husband held the majority stock in the corporation. It is, in our opinion, unreasonable to ascribe to the husband petitioner, F. E. Gooding, an intention at the time of the issuance of the notes ever to enforce payment of his notes, especially if to do so would either impair

> the credit rating of the corporation,[5] cause it to borrow from other sources the funds necessary to meet the payments, or bring about its dissolution. * * * [Footnote omitted.]

This points up the failure of O. H. Kruse to testify, for the unexplained terms of the note instrument leaves a permissible inference that O. H. Kruse, at the time he had his corporation issue the note to him, did not intend to enforce payment by his corporation if by so doing his corporation would be at all inconvenienced. This inference is somewhat strengthened by the subordination agreement executed by O. H. Kruse and his wife in November 1951 with the Bank of America at the time the corporation established a $100,000 line of credit with the bank. The said agreement subordinated the corporation's obligation on the note to the corporation's indebtedness to the bank and O. H. Kruse therein promised to do nothing toward collection or enforcement of the obligation of the note "nor interest thereon" as long as the corporation was indebted to the bank.

It is also of interest to note the treatment accorded the obligation of the note and especially the interest obligation by O. H. Kruse and also by the corporation. In 1950 the corporation accrued $9,000 interest on this note obligation and took a deduction therefor although the note by its terms did not provide for any interest until January 1, 1951. Hobson, who either kept the books or supervised the bookkeeping, and who made out the corporation's return merely stated this was a mistake: "When the 1950

return was reviewed, that error was corrected." Hobson also said he made out Kruse's 1950 income tax return but for some reason neither the original nor copy of this return was made available so we do not know how O. H. Kruse treated the $9,000 interest item in that return. We do know that in 1951 the corporation accrued $12,000 interest on the note and took deduction therefor on the return prepared by Hobson, and O. H. Kruse in his return for that year reported the receipt of no interest. Hobson testified he made out Kruse's return and this was another "mistake." His name does not appear on this return as the person who prepared it. Again in 1952 the corporation accrued $12,000 interest on the note and took deduction therefor in the 1952 return made out by Hobson. In O. H. Kruse's return for that year he only reported receipt of $6,000 interest on the note. Again Hobson states this was a mistake. This return bears Hobson's signature as the person who prepared it but underneath there is typed: "Prepared from data submitted by taxpayer." In the 1953 return of the corporation and O. H. Kruse, both prepared by Hobson, there is the deduction of $12,000 interest on the corporation return and the report of receipt of $12,000 interest on the O. H. Kruse return.

There is some question as to the sufficiency of the book entries to show interest accruals but we will assume Hobson, the certified public accountant, was at least correct, since 1951, in showing the interest accruals. It is no explanation for Kruse's and the corporation's accountant merely to say there were

"mistakes" in the books and corporation income tax return for 1950, and in Kruse's income tax returns for the years 1950, 1951 and 1952. All of these so-called mistakes relate directly to the alleged interest obligation which was the subject of deduction by the corporation in the years in question. It is obvious the treatment of the interest obligation in these early years must be termed a mistake if petitioner is to argue the note presents an unconditional and legally enforceable obligation for the payment of $200,000. But this treatment of the interest obligation, standing unexplained by O. H. Kruse, is some evidence that casts doubt as to there being an intention to issue a legally enforceable obligation. There are other bits of evidence that also cast doubt upon there being an intention to create a real debt when O. H. Kruse caused the corporation he controlled to issue the note to him. The note was unsecured. Although the corporation paid its obligations, other than this note, promptly, it made no payment on the principal on this note until November 1955, which was after the issue as to whether this was a true corporate obligation had been raised by the revenue agent.

Upon the whole record we hold petitioner failed to sustain its burden of proving the existence of an indebtedness to which the interest expense related.

Respondent makes an alternative argument with respect to the interest deductions for 1952 and 1953 to the effect that the corporation is barred by section 24 (c) from deducting interest it accrued which was not actually paid to or includible in the gross

income of O. H. Kruse within the taxable year that the deduction was taken or 2½ months following the close thereof. Because of our holding that the interest deductions were properly disallowed because no genuine indebtedness existed, we need not consider this portion of respondent's argument. But respondent makes a similar argument based on his determination with respect to $12,000 rental deduction petitioner took in 1952 and the $12,000 rental deduction petitioner took in 1953, which deduction respondent also disallowed.

The minutes of the corporation show the rental by the corporation, on a year to year basis, of all of the real property it occupied, which was owned by O. H. Kruse, consisting of two mills and a small house used for an office at a rental of $1,000 a month. No question is raised as to the amount of the rental being reasonable and the corporation accrued the $1,000 rental item each month. The rent of $12,000 for 1952 was not actually paid in that year to O. H. Kruse nor was it paid to him within 2½ months thereafter. The books of the corporation show the issuance of a check to O. H. Kruse dated December 15, 1953 in the sum of $12,000 which Hobson identifies as being for rent. Respondent does not seem to question this evidence as being sufficient to establish petitioner's payment of the $12,000 rent deducted in its 1953 return. The question is whether the evidence is sufficient to show constructive receipt by O. H. Kruse of as much rent as the corporation deducted for the year 1952.

Petitioner argues the $12,000 yearly rental during the years involved was "constructively received" by O. H. Kruse—that under the doctrine of constructive receipt the $12,000 rental was includible in the gross income of O. H. Kruse. The record shows that O. H. Kruse did include the $12,000 rental as income in his return for all of the years, including the years in question. In his return for 1951 O. H. Kruse reported $21,000 rental income from the corporation for this property which Hobson explains as another one of his "mistakes."

The issue turns upon whether the rental income was set apart or credited to O. H. Kruse so that it could be drawn upon by him without any substantial limitation. Geiger & Peters, Inc., 27 T.C. 911. The record is not too clear but the journal entry each month shows a debit to "Rent" or "Rental Expense" and credit to "Accrued Rent." These journal entries were posted in the ledger sheets of the corporation entitled "Accrued Rent." Hobson, who set up the books, testified he did not think it necessary that the accrued rent account be further identified in the books as an obligation owed to O. H. Kruse because this was the property the corporation occupied, and it was identified in the minutes as being Kruse's property that the corporation was renting and it was the only property it rented and he and O. H. Kruse knew exactly to whom the rental account was owed. It is true that there is not the same need for a multiplicity of accounts or identity of accounts in a small wholly owned corporation, such as would be required completely to inform officers,

directors, and stockholders of a corporation with many stockholders. It fairly appears from the books that the rent accrued during the years in question was the rent due to O. H. Kruse of $1,000 a month for the property petitioner occupied. We also hold this rent was constructively received by O. H. Kruse in 1952. When we treat the accrued rent account in the ledger as being an accrued obligation owing to O. H. Kruse, who was, in effect, in sole control of the corporation, it must be admitted the accruals were subject to his "unqualified demand." Platt Trailer Co., 23 T.C. 1065. Without delving deeply into the corporate finances, it is clear the corporation could have paid the rental obligation in 1952, either out of cash, or from borrowing on its unused line of credit in the Bank of America, or by a secured loan pledging some $300,000 in accounts receivable. We have earlier held the rental for 1953 was paid. We hold petitioner was entitled to the rental deductions in the sum of $12,000 for each of the years 1952 and 1953.

Decision will be entered under Rule 50.

Served May 26, 1959.

Tax Court of the United States
Washington

Docket No. 65683

O. H. KRUSE GRAIN & MILLING,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion, filed May 26, 1959, the parties herein having filed an agreed computation of tax on August 4, 1959, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1952 and 1953 in the respective amounts of $5,555.28 and $9,048.53.

[Seal] /s/ JOHN E. MULRONEY,
Judge.

Entered August 7, 1959.

Served August 10, 1959.

In the United States Court of Appeals
For the Ninth Circuit

T. C. Docket No. 65683

O. H. KRUSE GRAIN & MILLING, a corporation, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR REVIEW

O. H. Kruse Grain & Milling, a corporation, the petitioner in this cause, by LeVone A. Yardum, counsel, hereby files its petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by The Tax Court of the United States on August 7, 1959, T. C. Memo, 1959-110, determining deficiencies in the petitioner's Federal income taxes for the calendar years 1952 and 1953, in the respective amounts of $5,555.28 and $9,048.53, and respectfully shows:

I.

The petitioner, O. H. Kruse Grain & Milling, is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office at 1459 North Tyler Street, El Monte, California.

The tax returns for the years involved herein were filed with the District Director of Internal Revenue for the Sixth District California.

The principal place of business of the petitioner corporation, O. H. Kruse Grain & Milling, is within the jurisdiction of the United States District Court and United States Tax Court for the Southern District of California and within the jurisdiction of the Ninth Circuit of the United States Court of Appeals.

That the trial of the above matter in the Tax Court of the United States was tried in the Tax Court located in the Federal Building, Los Angeles, California.

II.

Nature of the Controversy

The controversy involves the proper determination of the petitioner's liability for federal income taxes for the calendar years 1952 and 1953.

In the year 1950, O. H. Kruse, an individual, transferred certain depreciable assets which had been used by him in the business conducted as a sole proprietorship, at their depreciated cost; prepaid expense items, and some cash totalling $89,792.23, subject to liabilities of $9,792.23, in exchange for eight hundred (800) shares of the capital stock of O. H. Kruse Grain & Milling, a corporation, the petitioner herein.

The said O. H. Kruse also transferred accounts receivable and the inventory of the business previously conducted by him in the amounts of $139,506.62, and $37,724.59, respectively, together with cash in the sum of $41,348.00, to the petitioner in exchange for its promissory note in the principal

amount of $200,000.00, and an open account receivable of $18,579.29.

In addition, he transferred to the petitioner intangible assets consisting of contracts, good will, etc., with a value of $208,973.00, for no consideration.

The promissory note issued by the petitioner to O. H. Kruse, in the principal amount of $200,000.00 was declared to be due "on or before December 31, 1950, or thereafter on demand." If not paid by January 1, 1951, interest became payable thereon at the rate of 6% per annum, semi-annually.

At a meeting of the Board of Directors of the petitioner, held on June 15, 1950, a resolution was adopted providing that payments to O. H. Kruse, other than those on the promissory note, should be applied first to accrued interest, secondly to accrued rental, and then to the open account.

The petitioner keeps its books and records on the accrual basis.

Interest on the note in question was accrued on the books of the petitioner, in the amount of $12,000.00, for each of the years 1952 and 1953.

Said note was paid in installments by the petitioner corporation to said O. H. Kruse, as follows:

November 1, 1955	$100,000.00
April 12, 1957	20,000.00
October 22, 1958	80,000.00
Total	$200,000.00

In its Federal income tax returns for each of the years 1952 and 1953, the petitioner deducted as an expense of doing business, the amount of interest accrued on its promissory note which was $12,000.00.

The Commissioner of Internal Revenue held that the said promissory note was not a bona fide obligation of the petitioner corporation and disallowed the deduction claimed for interest accrued thereon ($12,000.00) in each of the years 1952 and 1953, and determined the deficiencies for the years 1952 and 1953, as aforesaid.

The trial court, Tax Court of the United States, held that the petitioner corporation, in giving its promissory note to its majority stockholder, did not intend to create a true indebtedness within the meaning of Section 23(b) of the Internal Revenue Code of 1939 and consequently that the petitioner corporation was not entitled to deductions for interests on such note for the years 1952 and 1953.

Petitioner does not appeal from that portion of the findings and opinion of the Court which held that the rental payments to the corporation's majority stockholder which were accrued by the petitioner corporation on its books for the years 1952 and 1953 were includible in the gross income of the payee, O. H. Kruse, by application of the doctrine of constructive receipt, and that the claimed deductions made by the corporation were not barred by Section 24(e), Internal Revenue Code of 1939.

The said O. H. Kruse Grain & Milling, being

aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Court, and by its decision pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ LeVONE A. YARDUM,
Counsel for Petitioner.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed September 14, 1959.

In The Tax Court of the United States

Docket No. 65683

O. H. KRUSE GRAIN AND MILLING,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 9, Federal Building, Los Angeles, California, Thursday, January 8, 1959.

The above-entitled matter came on for hearing, pursuant to notice to the parties, at 10:00 o'clock, a.m.

Before: Honorable *James* E. Mulroney, Presiding.

Appearances: LeVone A. Yardum, Esq., 9405 Brighton Way, Beverly Hills, California, for O. H. Kruse Grain and Milling, Petitioner. John Schessler, Esq., and J. Earl Gardner, Esq., Room 1135, Subway Terminal Building, 417 South Hill Street, Los Angeles, California, for the Respondent. [1]*

Proceedings

The Clerk: Docket No. 65683, O. H. Kruse Grain and Milling.

Gentlemen, will you state your appearances for the record?

Mr. Yardum: LeVone A. Yardum for the petitioner.

Mr. Schessler: John Schessler and J. Earl Gardner for the respondent.

The Court: How long will this case take, gentlemen?

Mr. Yardum: We will estimate it, we originally estimated it two hours, your Honor.

It may take a little longer.

We can probably finish it this morning, your Honor. I think so.

The Court: Or early afternoon?

Mr. Yardum: We are in the process of signing a stipulation that should shorten it. I haven't signed it yet.

Are we going to go on first, your Honor?

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

The Court: Well, I think so. I thought we might go on with this case and dispose of this case this morning.

We will go on with the O. H. Kruse case.

I assume that before the case is submitted, you will be able to sign the stipulation?

Mr. Yardum: If I just take a few minutes now, I [4] can read it.

The Court: Very well. We will take a short recess.

(Short recess taken.)

The Court: The stipulation has now been signed, has it, and it is all right?

Mr. Yardum: Yes, sir.

The Court: We can proceed with this case. I am ready for the opening statements.

Do you want to make an opening statement, Mr. Yardum?

Mr. Yardum: Yes.

The Court: I would like one of you to tell me, briefly, what this case is about, the issues that are involved.

Mr. Schessler: If it please the Court, your Honor, in the case of O. H. Kruse Grain and Milling versus the Commissioner, the petitioner is a California corporation.

The proceeding involved deficiences of $13,994.26 for 1952, $19,192.33 for 1953.

The issues involved are a deduction for interest expense of $12,000.00 and a deduction of rental expense of $12,000.00 in 1952 and also in 1953.

In regard to the interest claimed as a deduction by the corporation, the Commissioner determined that no indebtedness existed within the meaning of Section 23 (b) of [5] the 1933 Internal Revenue Code and, further, that even if that indebtedness did exist, the interest expense was not paid during the taxable years 1952 and 1953 or within two and a half months following the close of the taxable years pursuant to Section 24 (c) of the 1939 Code.

Regarding rent, the Commissioner determined that the rental expense was not paid during the years 1952 and 1953, or within two and a half months following the close of the taxable years, pursuant to Section 24 (c) of the 1939 Code.

This corporation was organized in March, 1950, to take over hay, grain and feed business that was formerly owned by O. H. Kruse, individual, for about 14 years.

The corporation had an authorized capital stock of 3000 shares par value $100.00 each.

Most of the assets on the balance sheet of the sole proprietorship, except certain real property, was contributed to the corporation, according to the books, on or about April 1st, 1950, for $80,000.00 in stock issued to Mr. Kruse and his wife as joint tenants, a note of $200,000.00 to Mr. Kruse and an open account of approximately $18,500.00 to Mr. Kruse.

According to the corporate minutes, the note matured on December 31st, 1950, and bore six percent interest when paid at that time.

Respondent contends that the indebtedness to Mr. Kruse [6] was not bonafide in that an investment was intended and to subject the entire amount to the risks of the business and that he was not intended to be a creditor and have a definite obligation payable in any and all events.

In regard to Section 24 (c), respondent expects the evidence to show that even if there was an indebtedness, that the liability for interest was not paid or constructively received by Mr. Kruse for the years in question within the meaning of the regulations.

The rental issue relates to property owned by Mr. Kruse and rented to the petitioner.

The respondent expects that this rental liability was not paid to or constructively received by Mr. Kruse for the years in question within the meaning of the regulations.

The respondent will rely on the corporate records and the treatment by Mr. Kruse according to his income tax returns to show that the amounts were not constructively received by Mr. Kruse, to show that the treatment by the corporation and Mr. Kruse was not consistent in any of the years.

The Court: Just those two issues?

Mr. Schessler: Those are the issues, your Honor.

The Court: Do you have a stipulation to file?

Mr. Schessler: Yes, sir, your Honor. We have a stipulation that has been marked. [7]

The Court: The stipulation will be received.

Are you ready?

Mr. Yardum: I would like to make a short statement, your Honor.

You mentioned two issues. As I see this case, I believe there are three issues.

A primary issue, the one that I believe should be decided first, is whether this note which was given to Mr. Kruse and some $18,000.00 on an open account and returned as sale of assets, part of the assets, which he turned into the corporation, whether that note actually represents a capital investment.

Now, if the answer is in the affirmative on that issue, we would not be concerned with the constructive receipt.

If the answer is no, that it is actually a note and was actually a sale from Mr. Kruse to the corporation, then we become concerned with the interest, whether it was constructively paid by the corporation and constructively received by Mr. Kruse personally.

The rent, of course, is in issue separate and apart from the note versus capital investment.

The constructive receipt issue is on that issue, regardless of the other.

That is all. [8]

The Court: Call your witness.

Mr. Yardum: Petitioner will call Mr. Fray Hobson.

FRAY L. HOBSON

was called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the witness stand? State your name and address for the reporter.

The Witness: My name is Fray L. Hobson—F-r-a-y L. H-o-b-s-o-n.

My address is 3850 West Sixth Street, Los Angeles.

I am a certified public accountant.

Direct Examination

Q. (By Mr. Yardum): Mr. Hobson, how long have you been an accountant?

A. I have been a certified public accountant since 1948.

I worked in the accounting profession between 1936 and my entrance into the Military Service of three years' duration and I worked in a public accounting firm from that date until 1948.

Q. Would you give the Court a little bit of your background, schooling, in accounting?

A. I am a graduate of U.C.L.A. At that time it was the Economics Department. They did not have a School of [9] Business.

Q. How about your experience in the accounting field? Can you give us a general idea of what you have done?

A. I worked two years for Haskins and Sells—H-a-s-k-i-n-s and S-e-l-l-s—upon graduation, certi-

(Testimony of Fray L. Hobson.)

fied public accountants, and from that time until the beginning of the war I worked as an accountant in the management firm for motion picture people.

When I returned from the Service, I went to work for Arthur Young & Company, Certified Public Accountants, and later for a Mr. Hunt. It was a firm of public accountants in Beverly Hills.

I worked for them for—until 1948, at which time I went into practice for myself.

I have been practicing for myself since that day on.

Q. Are you familiar with the——

A. Excuse me. The name is Edling, Hightower and Hunt.

Mr. Yardum: If you would speak up, Mr. Hobson, and address your remarks to the Court and the reporter, they will be able to hear you if you speak out a little bit.

Q. (By Mr. Yardum): Are you acquainted with the petitioner corporation, O. H. Kruse Grain and Milling? A. Yes, I am.

Q. Are you an officer of that corporation? [10]

A. I am assistant secretary of the corporation.

Q. How long have you kept books for that corporation? A. Since its inception, in 1950.

Q. Were you acquainted with O. H. Kruse prior to the incorporation of the corporation?

A. Yes. He was a client of mine from the year 1948.

(Testimony of Fray L. Hobson.)

Q. In your capacity as an accountant, did you keep the books for Mr. Kruse prior to the time the petitioner was incorporated?

A. Yes, I did.

Q. From 1948 to 1950, is that correct?

A. From 1948 to 1950, that is correct.

Q. I see. And you kept the books continuously after the incorporation? A. That is correct.

Q. I assume that you took care of the books all through the transition from the sole proprietorship to incorporation? A. That is correct.

Q. Now, under what name was the—did Mr. Kruse conduct his business prior to the incorporation in March of 1950?

A. O. H. Kruse Grain and Milling.

Q. What was—what is the corporation name?

A. O. H. Kruse Grain and Milling. [11]

Q. It is the same? A. Same name.

Q. Can you tell the Court why the same name was retained?

Mr. Schessler: I object to that, your Honor.

There is no foundation that this man would know why the corporate name was retained.

The Court: Overruled. He is an officer.

A. The corporate name was retained in order to realize in full on the goodwill of the milling business that had been conducted prior to incorporation.

Mr. Schessler: Excuse me. I didn't hear that answer.

(Testimony of Fray L. Hobson.)

The Witness: The exact name was used in order to realize fully upon the goodwill that had been developed over the years prior to the incorporation.

Mr. Schessler: I object to that answer, your Honor.

There is nothing in the record to show that the corporation had goodwill.

The Court: Overruled.

The Witness: It was retained in order to make an orderly transition from the operation as a sole proprietorship to the operation as a corporation.

Mr. Kruse felt that the people——

The Court: We do not want you to tell us what Mr. [12] Kruse felt.

Q. (By Mr. Yardum): Just what you know.

A. Many of the feeders and the dairymen who had been doing business with Mr. Kruse over the years were very valued clients and we didn't want any possible illwill or loss of goodwill to result from a change in the type of operation or in the transition from a partnership to corporate activity.

We felt that, in order to go on doing business as usual, that probably we could best accomplish that end by retaining exactly the same name.

Q. Mr. Hobson, I am going to show you a copy of the stipulation which is on file here and refer you to Item No. 5, which sets forth the assets which were turned in by Mr. Kruse to the corporation in return for the 800 shares of stock.

Will you examine that, please?

(Testimony of Fray L. Hobson.)

Mr. Schessler: Just a second. Before you answer that; your Honor, I don't understand that the stipulation says that it was turned in for 800 shares of stock.

Mr. Yardum: Well, in exchange for the stock.

There is no issue as to how much stock was issued.

The Court: Have you a copy of that stipulation that I can use?

Mr. Yardum: I am referring to Item No. 5, your Honor. [13]

The Court: Well now, frame your question.

Q. (By Mr. Yardum): Mr. Hobson, the assets listed in this Item No. 5, that is, office equipment, autos and trucks, machinery and equipment, less accrued depreciation, prepaid insurance and insurance deposits less premiums and cash, were turned into the corporation; is that correct?

Are you familiar with that, are you not?

A. That is correct, yes.

Q. How many shares of stock were issued to Mr. Kruse in return for those assets?

A. Eight hundred shares.

Q. Now, were there any other assets—wait. Let me finish the question.

Were there any other assets which were in use or owned by Mr. Kruse in his business as a sole proprietorship which were turned into the corporation at the same time that these assets were turned in for stock?

(Testimony of Fray L. Hobson.)

A. Yes. All of the intangible assets were transferred.

Q. Would you itemize those intangible assets?

A. It would include goodwill. It would include the trade name for his product. It would include contracts with feeding associations.

It would include favorable buying contracts. It would include a going organization which was capable of [14] doing the job.

Mr. Schessler: Your Honor, I object to this answer. These are conclusions of this witness as to what goodwill would include.

What was transferred by Mr. Kruse should be in some corporate record of some sort, and unless the corporate record would be available to us, I think that this witness is merely testifying from what he thinks might have been included.

Mr. Yardum: If the Court please, that has nothing to do with what he thinks.

It has nothing to do with a fact.

I asked him if there were any assets of O. H. Kruse which he had as a sole proprietorship, if there were any that were turned over to the corporation other than those listed here, and he is just testifying to the fact that there were, in telling what there was.

The Court: He says that there were other intangible assets and he is giving his definition of what he considers intangible assets.

The Court is not bound by that, merely explanatory of its statement.

(Testimony of Fray L. Hobson.)

The answer can stand.

Q. (By Mr. Yardum): Mr. Hobson, was there any stock or any other consideration given to Mr. Kruse—— [15]

A. In return for these so-called "intangible assets" which you itemized.

Mr. Schessler: I object to this, your Honor. He wouldn't know what was given to Mr. Kruse.

Mr. Yardum: He is an officer of the corporation, your Honor.

The Court: He is an officer of the corporation. He can answer if he knows if there was any stock.

The Witness: There was none.

Q. (By Mr. Yardum): In your experience as an accountant, Mr. Hobson, do you know whether it is the normal practice for these so-called "intangible assets" to be listed on the books of the corporation?

Mr. Schessler: I object to that, your Honor, as not being proper testimony from this witness.

He, I will agree, is an officer of the corporation.

All he has done is take care of the books of this corporation.

The Court: Well, he has laid quite a foundation as an expert.

This question calls for an answer by an expert.

He may answer.

A. Yes, it is quite usual. [16]

Q. (By Mr. Yardum): Quite usual——

A. For such intangibles as goodwill to not be carried on the books at a fair market value.

(Testimony of Fray L. Hobson.)

In fact, it would be rather difficult in some cases to carry them on the books.

Q. Now, in addition to the assets set forth in Item 5 of the stipulation, and in addition to the—I will refer to them as intangible assets which you described to the Court—were there any other property transfers from Mr. Kruse to the corporation at the time of the transition between——

A. At the time of the transition the——

Mr. Schessler: Your Honor, I would like the witness to give a definite time, instead of the time of the transition.

The Court: Isn't that definitely fixed in 1950 when this was incorporated?

The Witness: April 1st, 1950.

The Court: April 1st, 1950.

Mr. Yardum: That is when the transition took place, at any rate?

The Witness: The accounts receivable, the inventory and some cash——

Mr. Yardum: I see. Now,——

The Witness: ——was transferred. [17]

Q. (By Mr. Yarum): Are those the items that were set forth in Item 7 of the stipulation?

A. In Item 7, yes.

Q. What, if anything, did the corporation give to Mr. Kruse in return for those assets?

A. The corporation gave a note for $200,000.00 and the remainder of 18,000 plus was carried on as an open obligation as an account payable on the records.

(Testimony of Fray L. Hobson.)

Mr. Yardum: Your Honor, we are going to introduce certain documents in evidence which we will need back at the end of the trial, and I believe counsel will stipulate that we can substitute photostats in place of these.

Mr. Schessler: Yes.

The Court: Have them identified by the Clerk.

The Clerk: For identification, Petitioner's Exhibit No. 1.

(Petitioner's Exhibit No. 1 was marked for identification.)

Q. (By Mr. Yardum): The note that you referred to which you stated was—which was given to Mr. Kruse in exchange for the assets which he transferred listed in Item 7 of the stipulation, is that the note that I am showing you now?

A. Yes, sir. [18]

The Court: That is Exhibit 1.

Mr. Yardum: Plaintiff's Exhibit 1. We will offer it in evidence, your Honor.

Mr. Schessler: Respondent has no objection, your Honor.

The Court: Exhibit 1 will be admitted.

(Petitioner's Exhibit No. 1 was received in evidence.)

Q. (By Mr. Yardum): Mr. Hobson, can you explain a little more fully these intangible assets which you referred to?

A. As to the nature of them?

Q. As to the nature of them.

(Testimony of Fray L. Hobson.)

You mentioned some contracts. What were these contracts?

A. There are various cooperative feeding associations in the Bellflower-San Dimas area, the Chino Valley, Baldwin Park that cooperate—their members will buy from one source.

The Cooperative guarantees the accounts receivable for the purchases by its members.

They buy on terms that are tantamount to cash, ten-day account or 15-day account.

They will guarantee a markup over the current grain quotations to the producer of the feed. [19]

Mr. Schessler: Your Honor, I think he is testifying to what certain contracts are.

If he is, the contracts themselves are the best evidence of what they are.

Mr. Yardum: I think he was just explaining, your Honor.

The Court: Not really introduced for establishing any fact in those contracts.

Mr. Schessler: Yes, I know.

The Court: It is merely explanatory, I think, of what he had in mind when he said intangible contracts.

Mr. Schessler: I see.

The Court: It is true that the contracts would be the best evidence.

Do I understand that these contracts were assigned by Mr. Kruse when he was operating as a proprietor to the corporation?

Mr. Yardum: That is correct.

(Testimony of Fray L. Hobson.)

The Court: Have you got those contracts here?

Mr. Yardum: No, no, your Honor.

Q. (By Mr. Yardum): You referred, Mr. Hobson, to——

The Court: We will let him go on for a little more.

Q. (By Mr. Yardum): ——to goodwill. From what did you conclude that [20] Mr. Kruse had any goodwill in this business as a sole proprietorship?

A. Could you repeat the question, please?

Q. You told the Court that Mr. Kruse had turned goodwill, among other intangible assets, over to the corporation and received no consideration therefor.

I just want to know how you conclude that there was any goodwill.

What is the basis of your statement?

A. The milling business or the hay grain business that had been operated for years was a profit-making business, and when you transfer a profit-making business that continues to make profits, there undoubtedly is goodwill.

Mr. Schessler: He testified that he didn't come to work for this organization until 1948; so, unless he can show that he knows something about the business prior to that time, he can't say that they had profit for any years.

The Court: Well, two years, for what it is worth. I don't know as it would go to the admissibility. It might go to weight.

(Testimony of Fray L. Hobson.)

Q. (By Mr. Yardum): Let me ask you this: Did Mr. Kruse, acting as a sole proprietorship in this grain and milling business, have a profit in 1948? A. Yes, he did. [21]

Q. Do you know how much it was?

A. I can't remember just offhand.

Q. Do you know whether it was over or under $50,000.00?

Mr. Schessler: Your Honor, he testified that he didn't know.

A. It was in excess of $50,000.00.

Mr. Schessler: Excuse me.

The Witness: May I say this? When the time came to compute the excess profits credit for purposes of computing the income tax and excess profits tax liabilities——

Q. (By Mr. Yarum): In what years?

A. For the years beginning with 1950 and continuing until the excess profits tax, provision no longer applied; it was necessary to go back five years and to determine what the net profit had been for the previous five years.

Q. Do you recall what it was?

A. I do not recall. I could find out quite easily.

Q. You stated in 1948 it was in excess of $50,000.00? A. It was in excess of $50,000.00.

Q. How about in 1949?

Was it in excess of $50,000.00?

A. It was in excess fifty, I believe.

Q. Did you ever make any computation in your capacity [22] as an accountant and as an officer of

(Testimony of Fray L. Hobson.)

the corporation as to the value of these intangible assets? A. Yes, I did.

Q. I see. And in your opinion, from that computation, what was the value arrived at?

A. In excess of $200,000.00.

Mr. Yardum: Counsel, you want me to lay a foundation for them?

Mr. Schessler: No. I have no objection to them.

Mr. Yardum: I want to have them offered.

The Court: Have them identified.

Mr. Yardum: These are the minutes of the incorporation of O. H. Kruse Grain and Milling, dated April 1, 1950.

It's also consent of the incorporators to the holding of the meeting.

The Court: That will be Exhibit 2.

The Clerk: Petitioner's Exhibit 2 for identification.

(Petitioner's Exhibit No. 2 was marked for identification.)

Mr. Yardum: We will have the same request in connection with these that we may withdraw them and put in the photostatic copy.

Next, Plaintiff will offer a minutes of the [23] meeting of the board of directors of O. H. Kruse Grain and Milling held on April 1, 1950, and the consent to the meeting.

The Clerk: Petitioner's Exhibit 3 for identification.

(Petitioner's Exhibit No. 3 was marked for identification.)

(Testimony of Fray L. Hobson.)

Mr. Yardum: Plaintiff would next offer the minutes of a meeting of O. H. Kruse Grain and Milling held on May 15th, 1950.

The Clerk: Petitioner's Exhibit No. 4 for identification.

(Petitioner's Exhibit No. 4 was marked for identification.)

Mr. Yardum: Plaintiff will next offer minutes of a meeting of the board of directors of O. H. Kruse Grain and Milling held on June 15th, 1950.

The Clerk: Petitioner's Exhibit No. 5 for identification.

(Petitioner's Exhibit No. 5 was marked for identification.)

Mr. Yardum: May we withdraw at this time, your Honor, the originals of May 15th and June 15th and put in their place photostatic copies or would you rather have it done all at the same time afterwards?

The Court: Let's see the copies. These are [24] pretty hard to read.

Mr. Yardum: We will have better copies made, your Honor.

The Court: It is pretty blurred.

Those are Exhibits 2, 3, 4 and 5?

The Clerk: That's right, sir.

Mr. Schessler: Respondent has no objection, sir.

The Court: They will be admitted.

The Clerk: Exhibits 2, 3, 4 and 5.

(Petitioner's Exhibits Nos. 2, 3, 4 and 5 were received in evidence.)

(Testimony of Fray L. Hobson.)

Q. (By Mr. Yardum): Mr. Hobson, I refer your attention to a letter dated September 9, 1955——

A. Yes.

Q. ——addressed to the District Director of Internal Revenue—that is a copy of the letter—in re O. H. Kruse Grain and Milling, and it doesn't have any signature on it.

Can you identify that document?

A. Yes.

Q. Is that a letter from you to the District Director of Internal Revenue?

A. The computation was made by me.

Q. How about——

A. This is the computation—— [25]

Q. This computation was made by you?

A. Yes.

Q. Whose letter is that?

A. I believe that's a letter from Mr. Mills—M-i-l-l-s.

Mr. Schessler: Your Honor, I think, unless he can make a more definite tieup as to just what that is——

The Court: He hasn't offered that yet.

Mr. Yardum: I haven't offered it yet.

I am trying to lay a foundation.

Q. (By Mr. Yardum): What was that computation? You say you made that——

The Court: Let's have this identified.

Mr. Yardum: Yes, sir.

The Clerk: For identification, Petitioner's Exhibit No. 6.

(Testimony of Fray L. Hobson.)

(Petitioner's Exhibit No. 6 was marked for identification.)

Q. (By Mr. Yardum): Now, you say you prepared this computation?

A. I prepared this computation.

The Court: Which is a part of Exhibit 6.

Q. (By Mr. Yardum): Which is a part of Exhibit 6. [26] A. Yes, your Honor.

Q. And will you explain just what that computation was?

The Court: Just a moment. I would like to know more about this instrument.

If this is something that is not his letter, I don't want any testimony about it.

Mr. Yardum: I think he has said that the letter is not his but that the computation was.

I think he can testify as to what the computation was, what it was made for.

The Court: Well, I will ask him a few questions.

Who was it made for?

The Witness: This computation was made pursuant to a conference that we had in the Director's office in Pasadena with Mr. Carey and Mr. MacArtney—M-a-c A-r-t-n-e-y.

Mr. Carey was the Revenue Agent.

Mr. MacArtney was his group chief at the time.

The Court: To whom was that computation sent?

The Witness: The computation was sent to Mr. Mills for transmittal.

The Court: Who is Mr. Mills?

The Witness: The gentleman at the table.

(Testimony of Fray L. Hobson.)

The Court: What is his connection in the case?

The Witness: Tax counsel. Mr. Mills has a power [27] of attorney for the corporation.

Q. (By Mr. Yardum): What was this a computation of?

A. At the conference, Mr. MacArtney indicated——

Mr. Schessler: I object, your Honor, unless he can show that he was there.

The Witness: I was there.

Mr. Schessler: And when the conference took place.

The Witness: I could not tell you the exact day right now.

It was prior to September 9th.

The Court: This was sent to the District Director of Internal Revenue. Do you have an original of this?

Mr. Schessler: It's very possible that we have, your Honor.

The Court: That would eliminate everything, if you have the original.

Mr. Schessler: May I just give this to the gentleman over here and let him look through the file, if they can get the original?

The Court: If they have the original, I don't presume you have any objection at all?

Mr. Schessler: I have no objection at all, if we can find it.

We have the original, your Honor, of this letter.

(Testimony of Fray L. Hobson.)

The Court: You would have no objection then to [28] this going in evidence?

Mr. Schessler: I have no objection that the letter, not the contents, as to what the contents say. I will not object that the letter did go from Mr. Mills to the Director on this date.

The Court: Of course. I mean, you are, of course, not agreeing to the contents except that the letter was sent with this computation?

Mr. Schessler: I have no objection to that.

The Court: The exhibit will be admitted into evidence.

Now you can testify freely with respect to that.

Do you want the original in evidence, or do you want the copy?

Mr. Schessler: It's immaterial, your Honor.

The Court: If there is no objection made on the basis of this being a copy, why the copy is just as good.

Mr. Yardum: Yes, I know that, if it's all right with counsel.

The Court: Well, we will admit the copy and let the Government keep its original for its files.

Mr. Schessler: Now, there are some markings on this letter that are not on this letter.

Mr. Yardum: We will stipulate that they may be disregarded, what is printed in pen. [29]

Mr. Schessler: With that understanding, I have no objection.

(Testimony of Fray L. Hobson.)

Mr. Yardum: In fact, I think if we can draw a line through the writing — may I do that, your Honor, draw a line?

The Court: Yes.

The Clerk: Petitioner's Exhibit 6.

(Petitioner's Exhibit No. 6 was received in evidence.)

Q. (By Mr. Yardum): Now, please explain to the Court what this computation is.

A. This is a computation of the value of the goodwill and the trade name of O. H. Kruse Grain and Milling as of the date when it was transferred to the corporation.

The computation was made pursuant to a request by Mr. MacArtney that such computation be made, and it was made using a formula that Mr. MacArtney and Mr. Mills had agreed upon as being reasonable and fair and one that they would agree upon.

The method of computation is one that is in use in many cases.

I believe his reference is ARM 34 or something to that effect, Hoskold, I believe the name was.

It set the pattern for this computation. The [30] computation was made by me.

Mr. Yardum: I want to make this clear in my own mind, too.

Q. (By Mr. Yardum): There were certain assets transferred by Mr. Kruse for stock.

(Testimony of Fray L. Hobson.)

There were certain assets transferred by Mr. Kruse to the corporation for a note and some $18,000.00 on open account. A. That is correct.

Q. And there were certain assets transferred by Mr. Kruse to the corporation for which he received no consideration, is that correct?

A. That is correct.

Q. And this computation is in connection with the assets which were transferred by Mr. Kruse to the corporation for which he received no consideration? Is that correct?

A. No stock was issued for it.

Q. No stock was issued.

Did he get any cash? A. No cash.

Q. Did he get a note for it? A. No.

Q. The corporation didn't give him anything for it? A. That's right. [31]

Q. Mr. Hobson, I refer your attention to—what do they call this?

A. This is a ledger, and this is a transfer binder. This also contains some of the journals——

Q. The journal is in a transfer binder?

A. In the transfer binder.

Q. Shall we refer to that as a ledger?

A. That will be proper, yes.

Q. I refer your attention to a ledger and a transfer binder with some tabs on the pages.

It says "Monthly Journals"——

The Court: Pardon me. I am going to take a recess for about ten minutes.

(Short recess.)

(Testimony of Fray L. Hobson.)

Q. (By Mr. Yardum): Mr. Hobson, going back a little ways as to the certain assets which were transferred by Mr. Kruse to the corporation for stock, certain assets transferred without consideration and certain assets transferred or sold in return for a note and $18,000.00 on an open account; is that correct? A. That is correct.

Q. Could you explain to the Court why it was done in this manner, why the transition from a sole proprietorship to the corporation was done in this manner? [32]

A. Let me understand your question.

Why it was transferred partly for stock?

Q. Partly for a note and partly for an open account credit and partly for no consideration.

A. The business of O. H. Kruse Grain and Milling, plus the goodwill, was transferred—the business—the mill, the equipment, the bulk tank trucks and office equipment were transferred for stock plus some cash and some intangibles.

The intangibles, the prepaid insurance, of course, were transferred.

Of course, to have canceled the policies and have rewritten them would have incurred a loss.

They were of no value to any other than the milling operation.

The mill and the operation was transferred for stock because, well, that was the business. That was it.

The cash, the receivables and the inventory represented the entirety of Mr. Kruse's estate, repre-

(Testimony of Fray L. Hobson.)

sented his lifetime of earnings, except for a few small investments that he had made.

He wanted—he transferred the mill and the milling operation for the stock because he wanted to operate the busines as a corporation.

He retained his lifetime savings in his estate because he had no desire—— [33]

Mr. Schessler: Your Honor, this——

The Court: Yes, of course, he can't tell us what Mr. Kruse wanted to do.

I don't understand what your question was. He has told us all these things before.

Your question was why did he do it this way.

Mr. Yardum: That's correct, your Honor.

The Court: Can you answer that specific question, why was it done this way?

The Witness: Perhaps I don't understand the question.

The Court: Well, I don't know as I do.

Is there something you are trying to bring out, why this was an unusual way and was done this way in this instance because of certain facts?

Mr. Yardum: I don't think it's unusual.

I want to know certain facts as to why it was done.

The Government has made a contention that this wasn't actually a note, wouldn't have been capital investment.

I think we should have a right to explain why it was done this way.

(Testimony of Fray L. Hobson.)

The Court: Sure you have, if he can give us an answer as to why it was done this way.

Mr. Yardum: I think he has given us a partial [34] answer in the rest of his testimony.

The Court: I think he has. Well, is there anything more?

Q. (By Mr. Yardum): Can you give us any more of an answer, Mr. Witness?

A. Yes. I sat in on the conference. I know why it was done.

Q. Just say why. If you know of your own knowledge, I think you can testify as to why it was done.

Don't say what Mr. Kruse thought, wanted, or—just why it was done.

Mr. Schessler: He should tell us who was present and where it was, if he is going to testify about a conference.

The Court: If it was done this way as a result of some conference, tell us what occurred.

The Witness: The conference was in the office of Mr. Kruse's attorney, Judge Wolford — W-o-l-f-o-r-d — of El Monte. Mr. Wolford handled the legal matters in connection with the incorporation from beginning to end.

Q. (By Mr. Yardum): Who else was present?

A. The three organizers. There was Mr. Kruse and his wife and the third one was Adolph Kruse.

Q. Were you present also? [35]

(Testimony of Fray L. Hobson.)

A. I was present. That was held in the office of Judge Wolford in El Monte and it was held in the early part of March, 1950.

That was the organizational meeting.

Q. I see. Now, you have given us certain reasons as to why the transaction was handled a certain way, and all I am trying to find out is if there are any further reasons as a result of this conference, I guess you can say them.

A. Mr. Kruse had a problem of having all of his personal funds in the one bank account which he used——

Mr. Schessler: That would be hearsay.

Mr. Yardum: It's a fact.

The Witness: I was——

The Court: Well, did that develop in the conference that that fact——

The Witness: Yes.

The Court: Thank you.

The Witness: Mr. Kruse had income or would have income up until the date when the transfer of the business of the corporation could be effected.

Provision had to be made for funds to pay his—to make his payments on his declaration of estimated tax for the year 1950.

He couldn't transfer all of his funds into the corporation. He had no desire to. That was his estate. [36] That was the accumulation of years——

Mr. Schessler: Your Honor, is this testimony to show what took place or the truth or what actually happened?

(Testimony of Fray L. Hobson.)

The Witness: This is the truth of what happened——

The Court: Excuse me. If you will just tell us what occurred at this conference.

The Witness: The conference, of course, was the organizational conference where the attorney——

The Court: I understand that. Now, what was said at this conference by whom?

The Witness: There was a discussion as to what was the grain business, what was to go into the corporation and which of the assets Mr. Kruse was going to retain himself, which of the assets he did not desire to put into the corporation for capital stock.

Q. (By Mr. Yardum): And the assets which he did not desire to put in for capital stock, are those the assets transferred for the note and the eighteen thousand some odd dollars open account?

A. That's correct.

Mr. Yardum: All right. You have answered the question.

Mr. Schessler: Your Honor, that type of testimony has to be hearsay.

I mean, what Mr. Kruse did and—— [37]

The Court: Well, I take it all, Mr. Schessler, as being the result of this conference, what were the decisions that were made at this conference by those present.

I think that's what the witness is trying to tell us.

Mr. Schessler: All right.

(Testimony of Fray L. Hobson.)

The Court: And, of course, in a way, it has hearsay overtones, but, nevertheless, it is not introduced to prove the facts that were in the statement.

It is merely to prove that those statements were made, at least, by somebody at the conference.

Mr. Schessler: If that is what the witness contends, I have no reason to object to that.

The Court: Is that a fair summation, that those are the decisions that were made by those organizers of the corporation at that time?

The Witness: If it's borne in mind that Mr. Kruse was a client of mine and did rely upon me for financial information, I believe it's a fair summation, yes.

The Court: I am asking you if these decisions that were made at that time were the decisions to put in certain assets for certain stock——

The Witness: Yes.

The Court: ——and things like that that you have testified about? [38]

The Witness: Yes.

Q. (By Mr. Yardum): Mr. Hobson, the sole proprietorship, at least from '48 when you represented Mr. Kruse, from '48 until the time of the incorporation, who ran that business?

A. Mr. Kruse, with the assistance of two key persons, Adolph Kruse, who is his mill supervisor, and a gentleman named Fred Schroder—S-c-h-r-o-d-e-r, who is his general manager and in charge of finance—or of the sales of the collections of the customer goodwill and so forth.

(Testimony of Fray L. Hobson.)

He is the man concerned with the matters other than the production affairs.

Q. Now, we have been referring to this as a sole proprietorship prior to March 27 or 28, 1950.

That indicates to me, anyway, that Mr. Kruse was the moving power behind the company.

Did he—was he?

A. Mr. Kruse was the business.

Q. Did he own it all himself?

A. He owned it outright.

Q. Were Mr. Schroder and Mr. Kruse his employees?

A. They are his employees, his key people.

Q. In other words, all of the decisions were made by Mr. Kruse?

A. The decisions, policy matters and so forth were [39] made by Mr. Kruse, yes.

Q. Now, after the incorporation, was there any change to speak of in this sort of management?

A. The management personnel was identical.

Q. I asked you whether there was any change in that type of management.

In other words, Mr. Kruse was making all of the major decisions? A. That is correct.

Q. Of course, he may have relied on people for advice and guidance? A. That is correct.

Q. Did he do the same after the incorporation?

A. That is correct.

Q. It was more or less under his complete control? A. Yes.

(Testimony of Fray L. Hobson.)

Mr. Yardum: Will you mark this for identification?

The Clerk: For identification, Petitioner's Exhibit 7.

(Petitioner's Exhibit No. 7 was marked for identification.)

Mr. Yardum: Your Honor, we will make the same request in connection with this book as we have with the rest of plaintiff's exhibits, that is, we will want to withdraw on stipulation and refer to only certain pages which we will [40] have photostated.

The Court: Oh, yes. I don't want the book in evidence.

Mr. Yardum: You don't want the whole book.

Q. (By Mr. Yardum): Referring your attention to ledger sheets in a binder there are some tabs that say "Monthly Journals" and "General Journal," and it says, "Special Check Record"—"Check Register in 1953."

They are the only tabs—oh, no, one other tab, two tabs "General Ledger, 1951, 1952."

Can you identify this book?

A. This is the transfer ledger of O. H. Kruse Grain and Milling.

Q. I see. For what period of time?

A. April 1st, 1950, to December 31st, 1950, the year 1951 and the year 1952, and the year 1953.

Q. Does this book contain the complete journal entries and ledger for the years at issue here, 1952 and 1953?

(Testimony of Fray L. Hobson.)

A. Would you please ask the question again?

Q. As I understand accounting, there are journal entries and there are ledgers, is that right?

A. Yes.

There are many special journals, such as cash receipts receivables. [41]

Q. I want to know if this contains all the journal entries for the corporation for 1952 and all the journal entries for 1953 for the corporation and all of the ledgers for 1952 and all of the ledgers for 1953.

A. Without checking in detail, I would say that it is the complete ledger for the year 1952, for the year 1953.

Q. I see. And——

A. It is the complete general journal for the year 1952, the year 1953, and is a complete journal of the recurring journal entries for the year 1952 and 1953.

Q. I see. As the accountant for the corporation, were these entries prepared by you?

A. The entries were prepared by me, yes.

Q. In other words, all of the writing in there is yours? A. That is correct.

Q. Mr. Hobson, as far as your books and records are concerned—not your books—I mean, the corporation's books and records are concerned, and Mr. Kruse's personal books and records which you kept prior to the incorporation, when did the transition take place from the sole proprietorship over to the corporation—— A. April 1st.

(Testimony of Fray L. Hobson.)

Q. ——on the books?

A. April 1st, 1950. [42]

Q. The cash, $41,348.08 is referred to in Item 7 of the stipulation.

Was there a new account opened to transfer that to the corporation?

A. No.

Q. Tell us what happened at that time as far as the cash is concerned.

A. The same bank account was retained in the same name.

There was an orderly transition from proprietorship to a corporation.

The same name and the same account were used.

Q. No change at all? A. No change.

Q. How about the accounts receivable? Were any of the debtors of Mr. Kruse personally notified that these accounts receivable had been turned over to a corporation in the same name? A. No.

Q. They were not notified? A. No.

Q. What changes actually took place during this transition, if any?

You don't know of any?

A. No. [43]

Mr. Schessler: What was the answer?

The Witness: No. He asked if I knew of any. I don't. It was a changeover from an operation as a sole proprietorship to the operation as a corporation.

Q. (By Mr. Yardum): Without any change in the name and without—and with any change in the

(Testimony of Fray L. Hobson.)

operation of the business the way they operated it?

A. That was the reason for using the identical name for an orderly transition.

Q. I see. Did you make out the income tax for Mr. Kruse personally? A. Yes.

Q. Was he on a cash or an accrual basis?

A. He would be on—for which years, now? '52 and '53?

Q. 1952 and 1953.

A. He would be on the cash basis.

Q. Did the corporation rent anything from Mr. Kruse?

A. Yes. The corporation rented the real property on Tyler Street.

Q. Would you describe that property?

A. When Mr. Kruse originally acquired the mill from its previous owner, he also bought some real estate——

Q. I want to know what it was. [44]

A. ——which included the whole mill. It included an old mill building.

Q. Tell us what kind of a building it was.

A. And a warehouse and a hay barn. He later acquired a small house, which he uses as an office, and constructed another hay barn.

Q. I see. What was the rent that the corporation —strike that.

Do you know what the value of that property would be, in your opinion?

A. That would be rather difficult for me to say. We did have an appraisal made of it.

(Testimony of Fray L. Hobson.)

Q. You did have an appraisal made of it?

A. Yes. I can't remember the figures.

Q. And what rent was the corporation paying for the property?

A. The rent that we considered fair was $1000.00 per month, and that was confirmed by an appraisal.

Q. Now, on the books of the corporation, can you find the—How was the rent set up on the books?

A. The rental is set up at the end of each month for the rent during that month.

Q. All right.

A. At the end of January the rent is set up for the month of January, the entry is made by me each month, the [45] charge to the rental expense and of course an account with Mr. Kruse's credit for $1000.00 each month.

Q. Can you find 1952, January 1952?

A. Yes. This is January. This is January, 1952.

Q. We refer to this as monthly journal entries —1952? A. MJ.

Q. MJ. What does that mean?

A. When these are posted, that means monthly journal.

It's a method I use so that I didn't have to write the entire description each month.

Q. This is actually the second page in the book, the first page after the page with no writing; is that correct? A. That is correct.

Q. And the front page contains January, February and March? A. That is correct.

(Testimony of Fray L. Hobson.)

Q. And on the back, April, May and June?

A. Yes.

Q. And the next page, July, August and September, and on the back of that, October, November and December? A. Yes.

Q. Now, is the rent, the thousand dollars a month, show up on these sheets?

A. Yes. The thousand dollars is charged to expense and it's credited to the account with Mr. Kruse. [46]

Mr. Schessler: Just a minute. If he is reading from this, your Honor, I wish he would read what it says.

The Witness: It says, "Interest," and it says, "Accrued Rent."

Mr. Schessler: Thank you.

Q. (By Mr. Yardum): Was that done in each month during 1952? A. Each month.

Q. On the books? A. Yes.

Q. What is the account that is credited?

A. Accrued rents.

Q. Would you find that account for us for 1952?

A. This is 1952.

Q. They have no page numbers, is that right?

A. No. I use the legend the name description only.

Mr. Yardum: Your Honor, may we refer to these as A, B, C and so forth?

The Court: I don't know. It's not going to be very clear in the record unless you make some refer-

(Testimony of Fray L. Hobson.)

ence that will identify the pages of the book that you are referring to.

Mr. Yardum: There are no page numbers, your Honor.

I think that if the pages that we are referring to may be referred to as Plaintiff's Exhibit 7 parenthesis and a small "a," is that all right? [47]

The Court: Any way you do it is all right, just so it is clear in the record.

Q. (By Mr. Yardum): The first page you are referring to, that is where you have the journal entries which show——

The Court: May I ask, are you going to introduce certain pages?

Mr. Yardum: Yes, your Honor.

The Court: Why don't you take them out of Exhibit A and introduce them—what is that?

Mr. Yardum: 7.

The Court: Exhibit 7.

Mr. Yardum: Will you take those out, Mr. Hobson?

The Court: Take out all of the pages that you are going to use.

Would it be harmful to your testimony if you took out all of the pages that you are going to introduce?

Mr. Yardum: Not at all.

The Court: Well then, do that.

Q. (By Mr. Yardum): I refer your attention to this——

(Testimony of Fray L. Hobson.)

The Court: Let's have that identified, those pages as 7-A; do you want them?

Mr. Yardum: Perhaps we can make them consecutively 7, 8, 9, and 10, now that we have gotten them out of the book? [48]

The Court: No. 7 will be no exhibit then.

Make that 7-A.

Mr. Schessler: Your Honor, there might possibly be some confusion as to just whose exhibits are what.

Perhaps I could suggest that the first one be 7 and the second one 8 and what have you.

The Court: Perhaps it would be better, because respondent uses letters.

Mr. Schessler: Yes.

The Court: I think you would be right.

Well, we will call that exhibit 7.

Mr. Yardum: This was marked 7 for identification.

The Court: So we will call the page that he gave you there Exhibit 7.

Mr. Shessler: Perhaps he should void that on the front.

The Court: Void Exhibit 7 as stated on this book.

(Petitioner's Exhibit No. 7 previously marked for identification was voided.)

The Clerk: Petitioner's Exhibits 7 and 8.

(Petitioner's Exhibits Nos. 7 and 8 were marked for identification.)

(Testimony of Fray L. Hobson.)

Mr. Yardum: Do you have any objection to our [49] introducing them into evidence at this time?

Mr. Schessler: Let me look at them. You are offering the front and back pages?

Mr. Yardum: Yes.

Mr. Schessler: Respondent has no objection, your Honor.

The Court: Exhibits 7 and 8 will be admitted.

The Clerk: Petitioner's 7 and 8.

(Petitioner's Exhibits Nos. 7 and 8 were received in evidence.)

Q. (By Mr. Yardum): On Exhibit 7, approximately two-thirds down the page, it says, "Accrued rent 1000 and it seems like it's credited to some account. A. That is correct.

Q. What is that credited to?

A. It's credited to an account designated "Accrued rent," which contains only the entries for rental payable to Mr. Kruse.

Mr. Schessler: Now,——

Mr. Yardum: Mark this for identification.

Q. (By Mr. Yardum): These are——

Mr. Schessler: I would like to ask a question at this point. He said it's credited to an account. [50] When he says "Credited to an account," that sheet just says, "Accrued rent."

The Court: Now, wait a minute. If you will tie that in by another question.

It is credited to an accrued account, was that it?

Mr. Yardum: Accrued rent account.

The Court: As shown on Exhibit 9, is that right?

(Testimony of Fray L. Hobson.)

Mr. Yardum: Exhibit 9.

The Court: That will be in the record then, so that we can read it.

Mr. Schessler: Thank you, your Honor.

The Clerk: Mark it for identification Exhibit 9.

(Petitioner's Exhibit No. 9 was marked for identification.)

The Court: Exhibit 9 is offered?

Mr. Yardum: Yes, it is offered.

The Court: You have no objection?

Mr. Schessler: No objection.

The Court: Exhibit 9 is admitted.

The Clerk: Petitioner's No. 9.

(Petitioner's Exhibit No. 9 was received in evidence.)

Q. (By Mr. Yardum): Does this Exhibit 9, accrued rent account, apply to any rent paid or owed by the corporation other than to Mr. O. H. Kruse? [51] A. No.

Q. Is there any other rent account to which other rentals may be credited or debited?

A. A nominal rental is paid to Southern Pacific Railroad for properties leased from them.

The payments are made, I believe, quarterly or semi-annually.

Q. I am not interested in how they are made. Is there a separate account set up for that?

A. We don't accrue that. It's nominal, and we charge it when it's paid——

Q. When it's paid? A. ——to expense.

(Testimony of Fray L. Hobson.)

Q. So the only accrued rent that the corporation could possibly have would be with Mr. O. H. Kruse personally?

A. The only one that is accrued and credited to this account, that is correct.

Q. Let me ask a question:

There is a note payable to Mr. Kruse for $200,000.00.

How was the interest payment handled in the books of the corporation?

A. The interest payable to him is recorded as an accrued interest at the end of each month. [52]

Q. Just a moment. You are referring to Exhibit 7 now?

A. Exhibit 7 shows accruals for the months of January, February and March on the first side; April, May and June on the second side.

The $1000.00 per month interest payable to him is accrued. It is charged to interest expense and it's credited to the accrued interest account, which is an account maintained with Mr. Kruse.

There are two other entries to the account.

Q. This accrued interest on Exhibit 7 which shows a thousand dollars each month for the first six months of 1952 and there is also accrued interest on Exhibit 8 which shows a thousand dollars a month for the last six months of 1952, that is the interest each month on the note which the corporation owed to Mr. Kruse; is that correct?

A. That is correct.

Q. The $200,000.00 note?

(Testimony of Fray L. Hobson.)

A. That is correct.

Q. And Exhibit 7 shows in January that it's credited to an account, well, each month on Exhibit 7 and Exhibit 8 the thousand dollars is credited to an account.

What account is that credited to?

A. It is credited to the accrued interest account.

Q. Would you find the accrued interest account [53] in these records for 1952?

A. That is the accrued interest. (Indicating).

It contains only the credits for interest accrued and payable to Mr. Kruse.

The Clerk: For identification, Petitioner's Exhibit 10.

(Petitioner's Exhibit No. 10 was marked for identification.)

Mr. Yardum: We will offer it in evidence at this time, your Honor.

Mr. Schessler: We have no objection, your Honor.

The Court: Exhibit 10 is admitted.

The Clerk: Petitioner's Exhibit No. 10.

(Petitioner's Exhibit No. 10 was received in evidence.)

Mr. Yardum: May I——

The Court: He has to mark it.

Mr. Yardum: Oh, I'm sorry.

Q. (By Mr. Yardum): Does this show that in each month during 1952 Mr.—pardon me—this accrued interest account was credited with a thousand dollars each month?

The Court: Exhibit 10.

(Testimony of Fray L. Hobson.)

Q. (By Mr. Yardum): Exhibit 10, sorry. [54]

A. Yes.

Q. Is there any other interest which may be payable, that is, accrued, or actually paid by the corporation which would show up in this account?

A. No.

Q. Then, this account would apply only to the account with Mr. O. H. Kruse?

A. That is correct.

Q. On the interest due on the $200,000.00 note?

A. That is correct.

Mr. Yardum: Would you mark these, please, Mr. Clerk?

The Clerk: As one or as two?

Mr. Yardum: Two, 11 and 12, in that order.

The Clerk: For identification, Petitioner's Exhibits 11 and 12.

(Petitioner's Exhibits Nos. 11 and 12 were marked for identification.)

Mr. Yardum: And 13 and 14, if you please.

The Clerk: For identification, Petitioner's Exhibits 13 and 14.

(Petitioner's Exhibits Nos. 13 and 14 were marked for identification.)

Q. (By Mr. Yardum): Mr. Hobson, I am going to refer your attention [55] to Exhibits 11 and 12 now.

The Court: Are they——

Mr. Yardum: They have not been offered yet. I just want to identify them a little more.

The Court: Is there any objection?

(Testimony of Fray L. Hobson.)

Mr. Schessler: No, your Honor. We have no objection if he makes a little further identification as to just what No. 12 is.

The Court: I see.

Q. (By Mr. Yardum): On Exhibit 11 it shows all of the accounts on the left, but on Exhibit 12 it does not show any accounts on the left.

Will you explain that so that we can tie these two exhibits together?

A. Yes. This is what in the accounting business we call a folio type of journal.

When they are installed in the binder, the facing pages open in a manner that you can cover a great many of months without writing in the explanation.

The figures on the face page of Exhibit 12 will correspond, line by line, with the description on Exhibit 11.

Mr. Schessler: Thank you.

The Witness: On the reverse side—— [56]

Q. (By Mr. Yardum): The reverse side of what?

A. On the reverse side where they are not facing pages, on Exhibit 12, the descriptions have been written in again.

Mr. Yardum: We will offer them in evidence, your Honor.

The Court: Exhibits 11 and 12 are admitted.

The Clerk: Petitioner's Exhibits 11 and 12.

(Petitioner's Exhibits Nos. 11 and 12 were received into evidence.)

(Testimony of Fray L. Hobson.)

Mr. Yardum: Plaintiff will offer 13 and 14 in evidence at this time, your Honor.

Mr. Schessler: Respondent has no objection.

The Court: The exhibits will be admitted.

The Clerk: Petitioner's Exhibits 13 and 14.

(Petitioner's Exhibits Nos. 13 and 14 were received in evidence.)

Q. (By Mr. Yardum). Exhibit 13 shows what appears to be 12 credits of a thousand dollars each. Would you explain what those entries are?

A. Those are credits to the accrued rent account, which is an account maintained with Mr. Kruse——

Q. What year?

A. For the year 1953. They are entries recording [57] the accrued liability of $1000.00 each month payable to Mr. Kruse.

Q. For what?

A. For the rental of the real property.

Q. On Exhibit 14 the accrued interest, that's a thousand dollars a month.

Is that also the interest on the $200,000.00 note?

A. Yes.

Q. During 1953?

A. During 1953. It is an entry of $1000.00 each month credited to the account with Mr. Kruse.

Q. You prepared these books. Did you start these books for the corporation? A. Yes.

Q. And all the entries were made by you?

A. Yes.

(Testimony of Fray L. Hobson.)

Q. You keep referring to the accrued interest and the accrued rent accounts as the accrued rent account with Mr. Kruse.

Why didn't you put Mr. Kruse's name in the account?

A. I prepared the ledger sheet. The ledger is in my possession or in Mr. Kruse's possession or in his custody and my possession, I should say, at all times.

The Court: The question was: Why didn't you put his name on it?

The Witness: I didn't feel it was necessary. [58]

The Court: That is your answer?

The Witness: Yes.

Q. (By Mr. Yardum): Why didn't you feel it was necessary?

A. We both knew what the credit was for. We both knew that $1000.00 each month was payable to him and that's what the entry was for.

I prepared the entry myself. I prepared the financial statements for Mr. Kruse.

Mr. Schessler: Your Honor, I think the witness is testifying as to what Mr. Kruse knew from looking at these books, these entries, and I think that that is hearsay and not proper from this witness.

He can testify what he knew about it.

The Court: The answer may stand only to show why, to explain why he didn't put the name on the account. They both know.

To that extent, it is received.

Mr. Yardum: That's all right.

(Testimony of Fray L. Hobson.)

Q. (By Mr. Yardum): Mr. Hobson, how much rent was actually paid to Mr. Kruse during 1952?

Did your books reflect that?

A. Yes. The sheets have been removed.

Q. Well, I'll let you find the right one here, and [59] refer to it by exhibit number.

A. Was the question during the year 1952?

Q. Yes.

There was $12,000.00 accrued rent. How much was actually paid to him?

A. None.

Q. How much rent was actually paid to Mr. Kruse in 1953 in connection with that thousand dollars a month?

A. Twelve thousand dollars.

Mr. Schessler: Your Honor, is this witness testifying from what appears on records or from what he knows of his own knowledge?

The Court: I thought he was going to testify from the records because his counsel handed him the records.

Mr. Yardum: I don't think he needs the records to testify to that.

The Court: Is there a record that shows that $12,000.00 payment?

The Witness: Yes, sir.

The Court: Here it is, counsel.

Mr. Yardum: Will you mark that as Plaintiff's next in order?

The Clerk: For identification, Petitioner's Exhibit No. 15.

(Testimony of Fray L. Hobson.)

(Petitioner's Exhibit No. 15 was marked for identification.) [60]

Mr. Yardum: I offer it in evidence.

Mr. Schessler: Respondent has no objection to Petitioner's Exhibit No. 15.

The Court: Exhibit 15 is admitted.

The Clerk: Petitioner's 15.

(Petitioner's Exhibit No. 15 was received in evidence.)

Q. (By Mr. Yardum): I will ask again, Mr. Hobson, how much of the rent due to Mr. Kruse was actually paid during 1953?

A. Twelve thousand dollars.

Q. Now, you are referring to Exhibit 15?

A. Exhibit 15, yes.

Q. Can you identify the entry?

A. The payment on Check 384.

Q. The payment on Check 384?

A. Payment made by Check 384.

Q. Is that the second line from the bottom on which there is some writing? A. Yes, sir.

Q. Do you know, of your own knowledge, Mr. Hobson, how much of the interest owing to Mr. Kruse was actually paid to him in 1952?

A. If I may see the accrued interest sheets.

Q. Oh, you want to refer to the books again?

A. To the entry sheets. [61]

The Court: The book would be better, anyway.

A. There is no payment of interest in the year 1952.

The Court: As shown by the books?

(Testimony of Fray L. Hobson.)

The Witness: As shown by the books.

Q. (By Mr. Yardum): Was there any interest actually paid in 1953? Refer to your books.

A. A payment of $2000.00 was made——

Q. Wait a minute, just wait a minute now.

Are you referring to this sheet here?

A. Yes.

Mr. Yardum: We are going to mark it for identification.

The Clerk: For identification, Petitioner's Exhibit No. 16.

(Petitioner's Exhibit No. 16 was marked for identification.)

Mr. Schessler: Respondent has no objection to Petitioner's Exhibit 16.

The Court: Exhibit 16 is admitted.

The Clerk: Petitioner's No. 16.

(Petitioner's Exhibit No. 16 was received in evidence.) [62]

Q. (By Mr. Yardum): I believe the question was how much interest was actually paid to Mr. Kruse in 1953 and you referred to Exhibit 17—16.

The Court: 16.

Q. (By Mr. Yardum): Can you now answer the question? A. Two thousand dollars.

Q. Is that the total amount paid to him?

A. Yes.

Mr. Schessler: As I understand it, your Honor, this witness is testifying that the entry on Exhibit 16 is $2000.00 interest? Is that it?

The Witness: That is correct.

(Testimony of Fray L. Hobson.)

Mr. Schessler: I don't think—There is nothing on——

The Court: Well, you can cross examine him. The exhibit is in.

Mr. Schessler: Yes, sir.

Q. (By Mr. Yardum): How much of the $12,000.00 accrued rent did the corporation deduct on its income tax return for 1952 as an expense?

A. The entire amount, $12,000.00.

Q. Twelve thousand dollars?

A. Yes. [63]

The Court: Of course, the income tax, the return, would be best. Is that in evidence?

Mr. Schessler: Not at this time, your Honor.

I have no objection to those going in as joint exhibits, your Honor.

The Court: Very well. What do you mark them now?

The Clerk: It will be Joint Exhibit 17.

The Court: A.

The Clerk: A, that's right, 17-A.

Mr. Yardum: 1953.

The Clerk: This will be the next exhibit.

Mr. Yardum: Next exhibit, joint exhibits.

The Clerk: For identification, Joint Exhibits 17-A and 18-B.

(Joint Exhibits 17-A and 18-B were marked for identification.)

The Court: The exhibits are admitted.

(Testimony of Fray L. Hobson.)

The Clerk: Joint Exhibits 17-A and 18-B.

(Joint Exhibits 17-A and 18-B were received in evidence.)

Q. (By Mr. Yardum): Mr. Hobson, your attention is referred to Exhibit 17-A. Please identify that document.

A. That is the U. S. Corporation Income Tax Return Form 1120 for the Year 1952 of O. H. Kruse Grain and Milling. [64]

Q. Was that prepared by you?

A. It was prepared by me.

Q. How much of the accrued interest—accrued rent of $12,000.00 was deducted by the corporation in 1952 on that return, the corporate income tax?

A. Twelve thousand of the accrued was deducted.

Q. How much of the accrued interest on the $200,000.00 note was deducted by the corporation as an expense on its 1952 return, Exhibit 17-A?

A. Twelve thousand dollars was, but I can't—There was additional interest on a bank loan.

Q. You can't tell from 17-A exactly how much it was? A. I will—$12,000.00.

Q. I refer your attention now to 18-B. Will you please identify that document?

A. Exhibit 18-B is the U. S. Corporation Income Tax Return Form 1120, for the Year 1953 for O. H. Kruse Grain and Milling.

Q. Now, how much of the accrued rent, the rent due Mr. Kruse, that is, $12,000.00, was deducted on the corporate income tax return in 1953?

(Testimony of Fray L. Hobson.)

A. Twelve thousand dollars.

Q. How much of the interest of $12,000.00 due on the $200,000.00 note due Mr. Kruse was deducted in 1953 by the corporation as an expense? [65]

A. Twelve thousand dollars.

Mr. Yardum: These will be——

Mr. Schessler: Joint Exhibits, your Honor, next in order, consecutive exhibits.

The Clerk: For identification, Joint Exhibits 19-C and 20-D.

(Joint Exhibits 19-C and 20-D were marked for identification.)

The Court: Exhibits 19-C and 20-D will be admitted.

The Clerk: Joint Exhibits 19-C and 20-D.

(Joint Exhibits 19-C and 20-D were received in evidence.)

Q. (By Mr. Yardum): I refer your attention to Exhibit 19-C and ask you if you will identify that document, if you can.

A. Exhibit 19-C is the U. S. Individual Income Tax Return, Form 1040, for the Year 1952 for O. H. and Helen D. Kruse.

Q. Did you prepare that return?

A. I prepared the return, yes.

Q. Now, you testified that the corporation deducted $12,000.00 as an expense to each—to O. H. Kruse for rent during 1952.

How much of that $12,000.00 was reported by [66] Mr. and Mrs. Kruse on their personal income tax return? A. Twelve thousand dollars.

(Testimony of Fray L. Hobson.)

Q. Now, you testified also that there was interest on the $200,000.00 note in the sum of $12,000.00 was deducted by the corporation as an expense in 1952.

How much of that interest was reported by Mr. and Mrs. Kruse on their personal return in 1952?

A. Six thousand dollars.

Q. Six thousand dollars?

A. Six thousand dollars.

Q. Would you please explain why the corporation deducted twelve and they reported only six?

A. It's an error.

Q. I refer your attention to Exhibit 20-D and ask you to identify that document.

A. Exhibit 20-D is the U. S. Individual Income Tax Return, Form 1040, for the Year 1953 of O. H. Kruse and Helen D. Kruse.

Q. Did you personally prepare that return?

A. Yes.

Q. Did you personally have charge of keeping the books individually for Mr. and Mrs. Kruse?

A. No formal records were kept for Mr. Kruse individually. He maintained a checking account at that time for the moneys that he received out of the rent, and he made [67] certain payments, such as taxes, and so forth, from his personal account.

Q. The rental due Mr. Kruse of $12,000.00 was deducted by the corporation in 1953, $12,000.00 worth.

How much of that was reported by Mr. and Mrs. Kruse in their personal return——

(Testimony of Fray L. Hobson.)

A. Twelve thousand dollars.

Q. ——as income?

Now, the corporation also deducted $12,000.00 interest on the $200,000.00 note.

How much of that was reported by Mr. and Mrs. Kruse as income in 1953?

A. Twelve thousand dollars.

Q. What was the financial condition of the corporation during 1952 and '53?

A. Sound.

Q. Did the corporation have a line of credit any place with any banking institution?

A. The corporation had a one hundred thousand dollar line of credit with the Bank of America.

Q. Is it possible from your records or from your personal knowledge to tell the Court how much of that hundred thousand dollars was available each month during 1952? A. Yes.

Q. Would you so testify, please? [68]

A. Yes, I would.

Q. How much was available in January? I don't want to ask you each month. A. Of 1952?

Q. Yes. A. Sixty thousand dollars.

Q. February? Go through January and February, go though the year.

A. At the end of January——

Mr. Schessler: If this witness is going to testify from a document, I suggest we——

The Witness: I prepared a schedule of this.

Q. (By Mr. Yardum): You have prepared a schedule? A. Yes.

(Testimony of Fray L. Hobson.)

Q. Do you have it with you?

A. I prepared a schedule for Mr. Mills, tax counsel.

Q. Are you testifying from the books now or from your personal knowledge?

A. I am testifying from the books at this point.

Q. All right.

The Court: Is that a schedule?

Q. (By Mr. Yardum): This. (Indicating.)

A. Yes. [69]

Q. I am handing you a document that says on the top "O. H. Kruse Grain and Milling, Drawings Against Bank of America Line of Credit."

Is that the document you were just referring to?

A. Yes, sir.

Q. Did you prepare this document?

A. I prepared it, yes.

Q. And from what records did you prepare it?

A. I prepared it from the general ledger of O. H. Kruse Grain and Milling.

Mr. Yardum: May it be marked for identification?

The Court: Yes.

The Clerk: For identification, Petitioner's Exhibit 21.

(Petitioner's Exhibit No. 21 was marked for identification.)

The Court: I might state to counsel, that if that is admissible, it will be only admissible subject to check, and I wouldn't expect you to check it now.

(Testimony of Fray L. Hobson.)

Mr. Schessler: Respondent has no objection under those conditions, your Honor.

The Court: Exhibit 21 will be admitted, subject to check.

I understand that the data contained thereon is taken from books and records that are now in the courtroom. [70]

Mr. Yardum: That is correct.

The Court: Subject to that, it will be admitted.

The Clerk: Petitioner's Exhibit No. 21.

(Petitioner's Exhibit No. 21 was received in evidence.)

Q. (By Mr. Yardum): Exhibit 21, could you please explain that document?

The Court: Just generally, don't read it.

A. A hundred thousand dollar line of credit was extended to O. H. Kruse Grain and Milling by the Bank of America.

The corporation drew against this line of credit from time to time.

At no time did it withdraw all of it.

The first borrowing was in October of 1951. The maximum borrowing against it was 60,000 leaving an unused remainder of 40,000.

The final payment—paid back to the Bank of America was made in December of 1952, and from that time on it has not been used.

Q. (By Mr. Yardum): What was the purpose for which this line of credit with the Bank of America was established?

(Testimony of Fray L. Hobson.)

A. During the year 1951 the physical plant was extended quite extensively. New pelleting machinery, new feed [71] making machinery was established to handle the additional load of manufacturing of bulk feeds.

Q. When did that line of credit end? I'm sorry——

A. The final payment was made in December of 1952.

Q. Do the records of the corporation reflect the amount of cash on hand each month during 1952?

A. Yes.

Q. And 1953? A. Yes.

The Court: Have you some tabulation of that? Have you made a tabulation of that?

The Witness: I don't have one here. I don't recall one.

The Court: All right.

Q. (By Mr. Yardum): This. (Indicating.)

A. Yes. That is the Bank of America.

Q. What is this?

A. That is the Bank of America—That is the ledger sheet that shows the Bank of America transactions and the balance on deposit with the Bank of America.

Mr. Yardum: Will you mark this for identification?

The Clerk: For identification, Petitioner's Exhibit 22.

(Petitioner's Exhibit No. 22 was marked for identification.) [72]

(Testimony of Fray L. Hobson.)

The Court: You have just about introduced the book.

Mr. Schessler: Respondent has no objection to this document—entry of the exhibit, your Honor.

The Court: Exhibit 22 is admitted.

The Clerk: Petitioner's Exhibit No. 22.

(Petitioner's Exhibit No. 22 was admitted in evidence.)

The Witness: I am in error. There are two sheets required.

The Court: Staple it on.

Q. (By Mr. Yardum): Now, referring your attention to Exhibit 22, identify that again, please.

A. Exhibit 22 is the general ledger account with the Bank of America.

Q. All right. Can you, from that document, tell us how much cash was on hand in the corporation in January of 1952?

The Court: Well, does the document show that?

The Witness: The document shows.

The Court: And does it show the amount that was on hand every month?

The Witness: Yes.

The Court: That's all we need to know.

Mr. Yardum: Nothing further. [73]

The Court: That is all we need to know rather than have him read it.

Q. (By Mr. Yardum): Do you have the equivalent ledgers for 1953? A. Yes, sir.

Mr. Yardum: Will you mark this for identification, please?

(Testimony of Fray L. Hobson.)

The Clerk: For identification, Petitioner's Exhibit No. 23.

(Petitioner's Exhibit No. 23 was marked for identification.)

Mr. Schessler: Respondent has no objection to Petitioner's Exhibit 23, your Honor.

The Court: Exhibit 23 is admitted.

The Clerk: Petitioner's Exhibit No. 23.

(Petitioner's Exhibit No. 23 was received in evidence.)

Q. (By Mr. Yardum): Exhibit 23, if you will, Mr. Hobson.

A. That is an account with the Bank of America.

Q. I see. Does this exhibit reflect the amount of cash on hand in the corporation each month during 1953? A. Yes, sir.

Mr. Yardum: You may cross examine.

The Court: I wonder, if we took the noon recess [74] at this time, if there would be any inconvenience to return at 1:30 because of this other case. Would that be any inconvenience?

Mr. Yardum: Yes. I have another matter set in Municipal Court at 1:30, at which I am going to ask for a continuance.

The Court: That's enough. I just wondered if it would.

We will adjourn then until 2:00 o'clock.

Mr. Yardum: Thank you, your Honor.

(Whereupon, a recess was taken until 2:00 o'clock of the same day.) [75]

Afternoon Session—2:05 P.M.

The Clerk: We shall proceed with the trial in Docket 65683, O. H. Kruse Grain and Milling.

FRAY L. HOBSON

was called as a witness by and on behalf of the petitioner, and, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Yardum: If your Honor please, as we adjourned for the noon recess, we had just gotten through with our direct examination and said counsel could proceed.

But he has no objection to our opening up the direct examination for just some short testimony.

Counsel for the Government has objected to our Exhibit 21 which, if you recall, was a summary which was made from the books. And he wanted the ledger sheet introduced, with an explanation.

The Court: Do you have one ledger sheet that shows all this data?

Direct Examination—(Continued)

Q. (By Mr. Yardum): Is that correct?

A. It is included on here.

Q. It is included on one sheet?

A. The sheet includes other notes. [76]

Q. But everything that is in Exhibit 21 is reflected on this ledger sheet, notes payable?

A. That's correct.

Mr. Yardum: May we mark this for identification?

(Testimony of Fray L. Hobson.)

The Clerk: For identification, Petitioner's Exhibit 24.

(Petitioner's Exhibit No. 24 was marked for identification.)

Mr. Schessler: Are you offering it?

Mr. Yardum: I will offer it at this time.

Mr. Schessler: No objection.

The Court: Exhibit 24 will be admitted.

The Clerk: Exhibit 24.

(Petitioner's Exhibit No. 24 was received in evidence.)

The Court: In view of the fact that you did give some testimony with respect to Exhibit 21, you now state that Exhibit 24 contains all of the data that is shown on Exhibit 21, is that right?

The Witness: Yes.

Mr. Schessler: I would like to add a qualification.

That exhibit that shows amounts are from the Bank of America, 21.

Exhibit 24 does not show to whom the notes are running. That is our objection to that document. [77] It was submitted conditionally that we would be able to check the books to verify that those were the amounts outstanding to the Bank of America, and the books reflect—the information reflected on Exhibit 24 does not show that those amounts on Exhibit 21 are the amounts of the loans outstanding to the Bank of America.

The Court: You can bring that out on cross examination.

(Testimony of Fray L. Hobson.)

The exhibit has been admitted and there has been testimony about it.

Now, we have the explanation of the two exhibits, so I would rather leave it in the evidence with that explanation.

Mr. Yardum: Yes.

The Court: You can cross examine anything about it and bring it out further.

Mr. Yardum: That was my next question, your Honor.

Q. (By Mr. Yardum): Mr. Hobson, Exhibit 21 that you said was a summary of what we now have admitted as Exhibit 24, you said that Exhibit 21 contained everything that was in Exhibit 24, is that correct?

A. I do not believe that I said everything contained in Exhibit 21 is in Exhibit 24.

Q. Let me ask you this: Exhibit 21, was that prepared from the information contained in Exhibit 24? [78]

A. Yes. The information reflected in Exhibit 21 is reflected—is contained in the exhibit which is now Exhibit 24.

Exhibit 24 is the ledger sheet for the notes payable to the bank and to other individuals.

Q. All right. Now, is there anything in Exhibit 24 that is not used in computing and making up Exhibit 21? A. Yes.

Q. What is that?

A. There is a note for $8000.00 which was assumed by the O. H. Kruse Grain and Milling Cor-

(Testimony of Fray L. Hobson.)

poration, the note being payable to a gentleman named Fred Schroder.

Q. That didn't have anything to do with the Bank of America?

A. Had nothing to do with the Bank of America.

Q. Are there any other entries on Exhibit 24 of notes payable that had nothing to do with the Bank of America?

A. There is a $3000.00 note.

Q. Would you explain what that $3000.00 note was?

A. I couldn't tell who it was.

Q. But it had nothing to do with the Bank of America?

A. Had nothing to do with the Bank of America.

It was a loan—there was a borrowing from an individual.

Q. Are there any other notes reflected on Exhibit 24, [79] notes payable, that had nothing to do with the Bank of America?

A. Yes. There is—May I see the records please, the books?

There is a note that was recorded in 1952 by journal entry for $4329.57, which had nothing to do with the Bank of America, and there was a note for $3000.00 which was recorded in December that had nothing to do with the Bank of America.

Q. Could you tell us what those notes are?

A. I can tell you to whom——

Q. I withdraw the question.

The Court: Do we need that?

(Testimony of Fray L. Hobson.)

Mr. Yardum: No. We don't need that.

Q. (By Mr. Yardum): In other words, there are four entries on this Exhibit 24, notes payable, the $8000.00 entry, the $3000.00 entry, the $4329.00 and the $3000.00 entry that had nothing to do with the Bank of America, is that correct?

A. Had nothing to do with the Bank of America.

Q. Everything else on Exhibit 24, notes payable, had to do with the Bank of America line of credit?

A. That is correct.

Q. Mr. Hobson, was that line of credit with the Bank of America in the amount of $100,000.00 open during 1953? A. Yes. [80]

Q. Looking at Exhibits 22 and 23, again, the figures on the right which say, "Balance" appear to be in red, some of them are in red and some of them are in pencil, red pencil and black pencil.

A. Yes.

Q. What does the black pencil indicate?

A. The black pencil indicates that that is the balance in the bank after deduction of all checks that were prepared after the end of the month but not issued until after the end of this month, had been deducted from the checkbook balance.

This would be the balance after all payables had been paid.

Q. I see. Now, the red pencil figures, what does that represent?

A. That would mean that after all the checks prepared to pay all the accounts payable as of the end of the month had been deducted from the

(Testimony of Fray L. Hobson.)

checkbook balance, that was an overdraft of $12,000.00.

It does not necessarily mean as an overdraft on the bank. It means that after the end of the month balance is reduced by the amount of all accounts payable as of that date, this is the deficit of the cash required to pay all accounts payable.

Q. Then, you would say that there was actually [81] no overdraft at the time—at the dates that these figures indicate, such as 31st of December, I imagine, this $12,000.00?

A. 31st of December. There would have been no actual overdraft, no.

This is, in effect, this is a composite of the bank account as a debit and the accounts payable, the trade accounts payable, as a credit.

Q. Go ahead.

A. As a matter of convenience and to avoid duplication in the accounting process, the check record is kept open for two weeks or until all of the bills are in.

Then checks are prepared in payment of those liabilities, and the checks are issued.

Those—The total of those checks that are issued during the, approximately the first two weeks of the month are included in the total checks for the month upon which the accounting work is being done by me.

That means that no accounts payable appear on the books.

(Testimony of Fray L. Hobson.)

They appear as a reduction of the cash account, in effect, as of the day on which the month ended.

They could have been shown as an account payable figure, thereby increasing this amount that is shown as cash but increasing as a contra item a credit in the records of balance of the accounts payable as of the identical date. [82]

Q. Would that explanation apply to Exhibits 22 and 23? Those are the two exhibits?

A. That would apply to the two, yes.

That procedure is followed to avoid having to list in detail the invoices for purchasing and then again duplicating the exact items by listing them in detail in the check register.

That is an accounting device.

Mr. Yardum: No further questions.

Cross Examination

Q. (By Mr. Schessler): Mr. Hobson, when did you go to work for Mr. Kruse?

A. In the year 1948.

Q. Do you recall when in 1948?

A. It was in the spring.

Q. What were your duties at that time?

A. I am an independent certified public accountant.

I was operating as my own practice. I took over the accounts of the public accountant who had previously been doing his work.

Q. I see. Then, you were not employed on a full-time basis by Mr. Kruse at that time?

(Testimony of Fray L. Hobson.)

A. Oh, no.

Q. He was just one of your clients?

A. He is one of my clients. [83]

Q. In 1948, I'm talking about. A. Yes.

Q. He was one of your clients at that time?

A. Yes.

Q. How long, or how much time did you spend in, say, 1948, 1949, working on Mr. Kruse's books—I mean, roughly speaking.

Did it take a long time or just how much time?

A. Probably three days each month.

Q. And what about 1950? A. The same.

Q. 1951? A. Yes.

Q. 1952? A. Every year.

Q. Through 1953 perhaps three days a month?

A. Through 1953, yes.

Q. Specifically what did you do for him three days a month?

A. I do the general ledger work for him.

I review the journals that are written up for him by his regular employees.

I prepare his confidential payroll for him.

I prepare the payroll tax returns and so forth.

Q. Just regular accounting functions? [84]

A. I think of myself, I believe he thinks—well, strike that.

I am his accounting department, as such.

Q. I see.

A. The cash journals and the sales journals are prepared by clerical-type help.

I review them. I post the general ledger.

(Testimony of Fray L. Hobson.)

Q. You review the journals and post the ledger?

A. Yes.

Q. In 1950, I believe, you testified that Mr. Kruse transferred his business from a sole proprietorship to a corporation.

I believe you stated that the books reflecting this took place on April 1st, 1950; is that correct?

A. Yes, that is correct.

Q. You, I think, have the corporate ledger sheets, I believe you described them as such, in front of you? A. Yes.

Q. Would you show me the entries that were made—that were made in April, 1950, to record this transaction?

A. I believe that these were identified as ledger sheets for the years '51, '52 and '53, with the journal entries for the years 1952 and '53.

Q. Are you stating that you don't have what I am asking for? [85]

A. They are not in here, no. I do not have it here.

Mr. Schessler: Do you mind if I look at that?

Respondent requests that this sheet be marked as Exhibit C, I believe.

The Court: No. E, isn't it?

You had a 20-D?

Mr. Schessler: Excuse me.

The Clerk: For identification, Respondent's Exhibit E.

(Respondent's Exhibit E was marked for identification.)

(Testimony of Fray L. Hobson.)

Mr. Schessler: Respondent requests that this sheet be marked next in order.

The Clerk: For identification, Respondent's Exhibit F.

(Respondent's Exhibit F was marked for identification.)

Mr. Schessler: Thank you.

Q. (By Mr. Schessler): I hand you what has been marked Respondent's Exhibit E and ask that you identify that sheet, please.

A. That is the capital stock account from the general ledger of O. H. Kruse Grain and Milling.

The Court: I didn't hear you.

The Witness: It is the capital stock sheet from [86] the general ledger of O. H. Kruse Grain and Milling.

Q. (By Mr. Schessler): Could you tell me the date that refers to?

A. Yes, April 1st, 1950, the date the assets were transferred.

Mr. Schessler: Respondent offers Exhibit E at this time.

Mr. Yardum: No objection.

The Court: Exhibit E is admitted.

The Clerk: Exhibit E.

(Respondent's Exhibit E was received in evidence.)

Q. (By Mr. Schessler): I hand you what has been marked as Respondent's Exhibit F and ask that you look at that sheet and identify it, please.

A. That is the sheet from the general ledger of

(Testimony of Fray L. Hobson.)

O. H. Kruse Grain and Milling which reflects the liability of the corporation to O. H. Kruse.

Q. And does that sheet tell us when that entry was made?

A. It was made as of April 1st, 1950.

Q. As of that date? A. As of that date.

Mr. Schessler: Respondent offers Respondent's Exhibit F at this time. [87]

Mr. Yardum: No objection.

The Court: Exhibit F is admitted.

The Clerk: Exhibit F.

(Respondent's Exhibit F was received in evidence.)

Q. (By Mr. Schessler): Now then, the books of the corporation reflected that the corporation owed Mr. Kruse $200,000.00 as of May 1st, 1950.

Mr. Yardum: Your Honor, I am going to object to the question on the grounds that it is outside of the scope of the direct examination. I won't object to the question if he makes this man his witness.

The Court: All right. I thought there was a great deal of talk about the $200,000.00 obligation.

Mr. Yardum: Well, there was no — the entire books were not in evidence.

Now, he has got these in as his own evidence.

The Court: Did he testify that there was a $200,000.00 obligation owed to Mr. Kruse?

Mr. Yardum: Yes.

The Court: Well, what is your objection?

The question was more or less preliminary, I thought, to another question. [88]

(Testimony of Fray L. Hobson.)

Mr. Schessler: Yes.

Mr. Yardum: All right. Are you ruling on the objection, your Honor?

The Court: I don't get your objection.

You say it is not proper cross examination?

Mr. Yardum: I thought he was asking about the —Well, I withdraw the objection.

The Court: Has he answered the question?

Mr. Schessler: No, he hasn't, your Honor.

Will the reporter please read the question?

The Court: Will you read it, please?

(The record was read.)

The Witness: May I see the ledger sheet?

As of May 1st?

Q. (By Mr. Schessler): No, April 1st, April 1st.

The Court: I think you said May 1st. I think you meant April 1st.

A. As of April 1st, the corporation owed Mr. Kruse $18,579.29.

Q. (By Mr. Schessler): And how much of that was represented by a note? A. $200,000.00.

Q. I believe you testified that you were an officer of the corporation, is that correct? [89]

A. Yes.

Q. When were you made an officer?

A. I do not recall.

Q. Were you an officer on April 1st, 1950?

A. Without reference to the minutes, I would not know.

Q. What is your—what office or position do you hold? A. Assistant secretary.

(Testimony of Fray L. Hobson.)

Q. And what are your duties as assistant secretary?

A. I am assistant secretary in order to authorize me or qualify me to sign various of the payroll tax returns, sales tax returns, to enable me to deal with certain matters such as the bank as an officer of the corporation.

Q. You don't know when you were made an officer? A. I do not remember.

The Court: He says he can get it with the minutes.

Have we got the minutes in the courtroom?

Mr. Schessler: Your Honor, as far as I know, we have some of the minutes in the courtroom.

I can hand Petitioner's Exhibits 2, 3 and 4 to him.

The Court: Well, if the date's important, I think we ought to get it, because it is understandable he would not remember, but we can certainly determine it if you want to know it.

Mr. Schessler: He has testified that he knew a lot of things about the corporation, and one of the [90] reasons he knew them was because he was an officer.

The Court: Yes. I say, if you want to find out the date, we can get it.

It is understandable that he wouldn't remember it.

Mr. Schessler: Oh, yes, sir.

The Court: But we have records here that ought to be able to tell us.

(Testimony of Fray L. Hobson.)

Mr. Schessler: Apparently, your Honor, there is no information on that in the court.

The Court: In the minutes, isn't there? He said he could tell if he could see the minutes.

Mr. Schessler: Do you have the minutes?

Mr. Yardum: There are no minutes, other than what is there.

There may be other minutes, but we don't have them.

The Court: Will any of those instruments tell when you were made an officer?

The Witness: I haven't found them yet.

Mr. Schessler: Your Honor, at this point, I would like to inform the Court that I requested all of the books and records of this corporation, and I now find out that they don't have all of the minutes.

I previously found out that there were other books and records that were not brought in today.

I did not issue a subpoena or a notice to produce. [91] However, we discussed this on at least two prior occasions that I wanted records.

I didn't specify because I didn't know just what were in all the records.

The Witness: I do not see it in here.

Q. (By Mr. Schessler): Well, then, can you testify as to what this corporation did in 1950, if you were—if you don't know whether you were an officer at that time?

Aside from your accounting duties to enter the information from the journal into the ledger, aside from those duties, can you testify as to just what

(Testimony of Fray L. Hobson.)

your duties were as far as this corporation was concerned in 1950?

Mr. Yardum: I think he has—I object to the question.

He has already answered it, your Honor.

The Court: Overruled.

A. The actual date when I was made the assistant secretary I do not know.

I have been the accountant, the auditor for Mr. Kruse since 1948.

I was present at the conferences when they went into the details of the organization of the corporation as advisor in the office of Judge Wolford in El Monte.

I set up the records. I worked with Mr. Wolford [92] in connection with the incorporation.

Q. (By Mr. Schessler): In what way did you work with him?

A. Providing statements as required, providing information as required.

Q. Just usual, routine accounting features, so far?

A. Not necessarily routine, but accounting function, the function of an independent C.P.A.

Q. I meant routine accounting functions.

A. Not necessarily routine. It is an accounting function.

Q. Well, what did you do, aside from your accounting functions, in 1950?

You testified that you worked three days, approximately three days a month on this operation.

(Testimony of Fray L. Hobson.)

A. Yes. I do all of their accounting, the general accounting.

Q. Isn't it true that that's your major job, is just to take care of the books and records of this corporation?

A. Yes. As such, I'm familiar with it.

I'm not claiming otherwise.

Q. You are familiar with the workings of this corporation because of your duties as an accountant the three days each month?

A. Yes. I am available for call at all other times.

Q. A few moments ago you looked at the [93] corporate minutes, Petitioner's Exhibits 2, 3 and 4.

I invite your attention to Exhibit 4 and ask that you look at it so that you can be familiar with what it contains.

I am particularly interested in the offer of Mr. Kruse to transfer certain assets to the corporation in exchange for stock.

Are you familiar with what the minutes say about that?

A. Yes. I would like to read them, though, however.

Q. Are you familiar now with what the minutes, Petitioner's Exhibit 4, have to say about Mr. Kruse's transfer of assets in exchange for stock?

A. Yes.

Q. Do those minutes indicate that that transaction has taken place?

A. The minutes make an offer based upon a statement as of March 31st.

(Testimony of Fray L. Hobson.)

You have to bear in mind it takes time to develop a statement as of March 31st.

This meeting was held when that statement became available, when I was able to compile the figures.

It is impossible to present a statement that is—that is usable for purposes of obtaining stock permits and [94] so forth as of the day following the end of the month.

Q. Of course, we have the minutes in the record, so we don't have to belabor the point.

I am referring now to Petitioner's Exhibit 5.

I invite your attention to the resolution on the second page of that exhibit.

A. Yes.

Q. According to that resolution, the officers were directed to execute a loan to Mr. Kruse, execute a note in Mr. Kruse's favor.

A. Yes. It doesn't say the reason; it says note.

Q. Yes. And that is dated June 15th, 1950, is it not? A. Yes.

Q. I invite your attention to the next to the last paragraph in order to perhaps refresh your recollection.

Maybe it will be unnecessary, but I would like to know if there are any provisions concerning the application of payments to Mr. Kruse on interest and on rent and on the open account.

A. The minutes specified that the payments are to be applied first to an accrued interest, secondly to accrued rental, and then to open account.

(Testimony of Fray L. Hobson.)

Q. And those minutes specify that interest is to start on January 1st, 1951, is that correct? [95]

A. That is correct.

Q. Could you tell me what the books, the account books reflect for interest on the loan to Mr. Kruse for the year 1950?

Mr. Yardum: I object to the question as being incompetent, irrelevant and immaterial.

The Court: Overruled.

A. As of December 31st an entry was made accruing $9000.00 rental payable to Mr. Kruse and $9000.00 interest payable to Mr. Kruse by agreement.

When the 1950 return was reviewed, that error was corrected.

Q. (By Mr. Schessler): I would like to be certain I understand just what you are saying, Mr. Hobson.

This entry was made on the books showing that it was owed to Mr. Kruse?

A. There was an entry—What was your question originally? I thought I had answered the question.

Q. What did the books reflect in regard to interest for the period April 1, 1950, through December, 1950?

A. An entry was made to record interest expense and to record accrued interest payable to Mr. Kruse.

Q. And then the method used was not the same as that used in, say, 1952 and 1953? [96]

(Testimony of Fray L. Hobson.)

Mr. Yardum: I object to that. The books will speak for themselves, whether they are the same or not.

Mr. Schessler: The witness should know what the books say.

The Court: Well,——

Mr. Yardum: You are arguing with the witness then.

The Court: Let the witness point to any of these entries.

You asked him what the books show. If the books show anything, let's see what the books show.

Mr. Schessler: I certainly would like to see myself, your Honor.

Those entries are not available to us.

The Witness: I believe that the sheet showing accrued interest liability has been submitted previously.

As of what date, sir?

Q. (By Mr. Schessler): The entries in the books for the period April 1st, 1950, through December, 1950.

A. I do not have the sheet showing accrued interest as of December 30th, 1950.

Apparently, there was none.

The Court: I can't hear you.

The Witness: Apparently there was no accrued interest shown as payable to Mr. Kruse as of January 31st, 1951. So,—— [97]

The Court: As of what?

(Testimony of Fray L. Hobson.)

The Witness: As of January 1st. Each year—The accrued interest account, a liability for accrued interest, was not outstanding as of December 31st, 1950. I do not have the sheet here.

It was not carried forward to the transfer—to the new ledger.

The Court: Just a minute. I want to get this straight.

You were asked what the books showed with respect to the accrual of the interest for the period April 1st, 1950, through the month of December, 1950, and you replied that the books showed the accrued interest.

Now, do you find that entry in the books?

The Witness: I see no sheet for accrued interest.

The Court: Well then, your answer is different, is it?

The Witness: Is there another sheet that has been removed earlier?

Do I have them all?

Mr. Schessler: Mr. Hobson, I asked for all of the sheets, and I was advised that they would all be here.

It is my impression here today that they are not all here. [98]

Mr. Yardum: What is counsel inferring, that we have taken sheets out of this book or something?

Mr. Schessler: I am inferring that you do not have the entries for May 1st, 1950.

The Court: April 1st.

(Testimony of Fray L. Hobson.)

Mr. Schessler: April 1st, 1950, through December, 1950.

The Witness: We have the sheets for 1952 and 1953.

Mr. Schessler: Yes. I specifically asked counsel to bring the books for the period 1950, 1951, 1952 and 1953, and each time I made that request, I was advised by counsel that those years were immaterial and that they would not be properly before the Court; and I asked that they furnish them and I would attempt to introduce them and let the——

The Court: Do you know that they were not going to furnish them?

Mr. Schessler: My last telephone conversation was yesterday, and I said, "Please bring them, because I am going to attempt to introduce them into evidence."

And I said, "I'm sure that we will need those to get a complete picture of the transaction," and at that time I was not—I just wasn't sure what they were going to do.

This morning I found out that they do not have them.

I had a subpoena prepared to serve on Mr. Kruse [99] in the event that they were not here this morning, and Mr. Kruse himself is not here, so I was unable to serve the subpoena.

I think the same situation exists for the year 1951.

The Witness: Exhibit 10, accrued interest, 1951.

(Testimony of Fray L. Hobson.)

Q. (By Mr. Schessler): This is the ledger account.

Do we have the journal entry?

A. Yes, you have an exhibit for that, too.

Oh, for the year '51? No. These are the journals for the year '52—the years '52 and '53.

This is the general ledger for the year '51 which was handled in exactly the same manner.

Mr. Schessler: Your Honor, I will attempt to get this information in the record by using the '52 and '53 and ask if the '50 and '51 were handled in the same way, and perhaps that would enable us to do that, if I may.

The Court: All right. Go ahead.

Q. (By Mr. Schessler): Will you look at the journal entries for accrued interest for 1952 and 1953 appearing on Petitioner's Exhibits 7 and 8?

Those are for 1952.

I ask you, Mr. Hobson, please, would you tell me [100] if—if the accrued interest was handled in the same fashion for the period April 1, 1950, through December 30th, 1950?

Mr. Yardum: Object on the grounds that it is irrelevant and immaterial.

The Court: Overruled.

A. The accrued interest payable was recorded by a journal entry.

Q. (By Mr. Schessler): By whom, sir?

The Court: That wasn't the question. Was it the same or different?

(Testimony of Fray L. Hobson.)

The Witness: Could you please clarify your question? By "the same" I do not——

Mr. Schessler: Your Honor, counsel knows—May I confer with counsel?

The Court: Yes.

(Discussion off the record.)

Mr. Yardum: We have a stipulation, your Honor.

We will stipulate that the interest, accrued interest on the $200,000.00 note was treated the same on the books of the petitioner corporation in 1951 and 1950 as it was in 1952 and 1953.

Mr. Schessler: Respondent so stipulates.

Q. (By Mr. Schessler): Mr. Hobson, would you please look at the corporate [101] records there in front of you and tell me if in any of those corporate books there is any account which shows accrued interest or accrued rent payable to Mr. O. H. Kruse for any time that we have records available?

Do you understand the question, Mr. Hobson?

A. I have answered a similar question before.

In fact, I have answered the same question before.

My answer before was that at the end of each month an entry was made recording the liability for accrued interest payable to Mr. Kruse.

The question——

Q. Excuse me, I'm sorry.

A. The question—I also stated that at the end of each month an entry was made, I believe it pertained to the years 1952 and '53, recording the ac-

(Testimony of Fray L. Hobson.)

crued liability payable—or the accrued rent payable to Mr. Kruse.

We showed the sheets. They were placed in evidence, showing the account to which—the account to Mr. Kruse to which those entries were made.

I was asked why it did not show the name Mr. Kruse on the sheet. My answer at that time was, "I didn't think it was necessary."

Q. I understand your testimony then to be that there is nothing on these sheets that indicate that accrued interest or accrued rent was owing to Mr. Kruse? [102]

Mr. Yardum: The sheets will speak for themselves; I object.

The Witness: I believe you——

Mr. Schessler: I'm sorry.

Mr. Yardum: He was answering while I was trying to object.

The Court: I think it is clear enough. The sheets do not have Mr. Kruse's name on them.

Mr. Schessler: Thank you, your Honor.

Q. (By Mr. Schessler): Are there any entries in the corporate records that are before you which indicates that any amounts for interest or rent were set aside, taken out of the corporate funds, so to speak, and set aside for Mr. Kruse, that were earmarked for Mr. Kruse?

A. By "earmarked" do you mean placed in a special account?

Q. Yes.

A. No. There would be no reason for it.

(Testimony of Fray L. Hobson.)

Q. There is no corporate record then showing that any——

A. Perhaps I misunderstand your question.

The journal entry which records a liability payable to Mr. Kruse, in effect, shows that an amount is payable to him and acts to set aside funds to pay it. [103] You are referring, I presume, to the actual setting up of a sinking fund account to provide actual cash to meet this liability, is that correct?

Q. That is correct.

A. No. Such a thing wouldn't be necessary.

Q. The only things that we have referring to the accruals of rent and interest are the documents that have already been introduced in evidence, is that correct, Mr. Hobson?

A. You are asking now about the books of account?

Q. That is correct.

A. The books of account in the ledger that reflect the obligation to Mr. Kruse have been introduced.

Mr. Schessler: Thank you.

Respondent requests that this document be marked for identification next in order.

The Clerk: For identification, Respondent's Exhibit G.

(Respondent's Exhibit G was marked for identification.)

Q. (By Mr. Schessler): Mr. Hobson, I hand you what has been identified as Respondent's Ex-

(Testimony of Fray L. Hobson.)

hibit G and ask, if you can, tell me what it represents.

A. The United States Corporation Income Tax Return, [104] Form 1120, for the Year 1950, for O. H. Kruse Grain and Milling.

Q. And does your name appear on that?

A. Yes. I prepared the return.

Mr. Schessler: At this time, Respondent offers into evidence Respondent's Exhibit G.

Mr. Yardum: Object on the grounds it is irrelevant and immaterial.

The Court: For what purpose?

Mr. Schessler: I want to show that the corporation deducted interest on the note when the terms of the note did not call for interest until 1951.

The Court: The exhibit will be admitted.

The Clerk: Respondent's Exhibit G.

(Respondent's Exhibit G was received in evidence.)

Q. (By Mr. Schessler): I believe that we have your testimony before the Court that the corporation accrued interest and accrued rent payable to Mr. Kruse in 1950.

Could you look at that return and tell me if they deducted those accruals? A. Yes.

Q. I believe you testified that you prepared Mr. Kruse's return? [105] A. Yes, sir.

Q. Do you know how Mr. Kruse treated those items?

Mr. Yardum: I object to that; the return would be the best evidence.

(Testimony of Fray L. Hobson.)

The Court: Sustained. That's true, you must have the return.

Mr. Schessler: Your Honor, I do not have the original return. I do not have a copy of the return.

The only information that is available at this time is a Revenue Agent's — copy of a Revenue Agent's report that is in the petitioner's possession.

I thought that all of these documents were in the return—in the file until I found out three days ago that they weren't there, and at that time I asked counsel for petitioner to—if they would give that information to me.

The returns——

The Court: What was his reply?

Mr. Schessler: The first time, the information would be that he would give me all information that was necessary.

Mr. Yardum: Just a minute, now. Are you talking about me, counsel?

Mr. Schessler: Well, at that time you were not the counsel.

The Court: Well, the Government ought to have [106] its returns here, if it wants to.

If we are going to talk about some income tax returns, the Government certainly has a way of getting income tax returns.

Mr. Schessler: Well, Mr. Hobson prepared the returns. He can testify——

The Court: I don't like him to testify about what is in them.

(Testimony of Fray L. Hobson.)

The returns themselves are the best evidence of what is in them.

Have you copies of the return available?

Mr. Yardum: No.

Mr. Schessler: No, sir. But this morning, counsel advised me that if we could get testimony in as to 1950, that he would stipulate as to Kruse's treatment——

Mr. Yardum: Wait just a minute. You are putting words into my mouth.

I never told you that I would do that.

I don't know what you wrote down, but I don't know anything about that.

I am certainly not bound by it.

The Court: The evidence is in. I let evidence in with respect to 1950.

Mr. Schessler: Your Honor, we discussed that this morning and he looked at the Revenue Agent's report this [107] morning to see how it was treated, and I was of the impression, I'll state it that way, that counsel would agree that if you would let evidence of that nature in as to how it would be—perhaps I misunderstood counsel.

Mr. Yardum: I have never seen the return, your Honor. How can I agree to stipulate to something I haven't seen? I have just asked Mr. Mills, tax counsel, and he said that he never received a return.

The Court: For the year 1950?

Mr. Mills: The individual return.

Mr. Schessler: All right, your Honor.

We will go on.

(Testimony of Fray L. Hobson.)

Respondent requests that this document be marked as Respondent's Exhibit next in order.

The Clerk: For identification, Respondent's Exhibit H.

(Respondent's Exhibit H was marked for identification.)

Mr. Schessler: Your Honor, this is the individual income tax return of O. H. and Helen D. Kruse for 1951, and counsel for petitioner will object to this on certain grounds.

The Court: Have you offered it?

Mr. Schessler: I am going to offer it as Respondent's Exhibit H.

Mr. Yardum: I object to it on the grounds that [108] it is irrelevant and immaterial.

The Court: For what purpose are you offering it?

Mr. Schessler: To show the treatment by Mr. Kruse of the accrued rent and accrued interest.

The Court: The exhibit is admitted for that purpose.

The Clerk: Respondent's Exhibit H.

(Respondent's Exhibit H was received in evidence.)

Q. (By Mr. Schessler): Do you recall if you prepared the '51 return, Mr. Hobson?

A. Yes, I prepared it.

The Court: Let Mr. Schessler take it. It's an exhibit in the case.

Q. (By Mr. Schessler): I hand you Respondent's Exhibit H and ask that you look at Mr.

(Testimony of Fray L. Hobson.)

Kruse's treatment of income from income from rents, and after you have looked at that, I ask how much rent did Mr. Kruse report?

A. Twenty-one thousand.

Q. And how much interest? A. None.

Q. And that's another one of those errors that you were referring to in your exhibit about the '52 return? [109]

A. This should have been reported as—Yes, yes, sir.

Mr. Schessler: Respondent requests the Clerk to mark this document Respondent's Exhibit next in order.

The Clerk: For identification, Respondent's Exhibit I.

(Respondent's Exhibit I was marked for identification.)

Q. (By Mr. Schessler): Mr. Hobson, I hand you what has been marked as Respondent's Exhibit I for identification and ask you if you are familiar with that. A. Yes.

Q. And if you are, will you tell us roughly what it is?

A. It is a subordination agreement on the form of the Bank of America whereby——

Q. Just give us the date of it and then tell us what is the next one and I think that will be sufficient identification for my purposes.

A. Perhaps it wouldn't be for mine.

Q. Oh, I'm very sorry.

(Testimony of Fray L. Hobson.)

The Court: That's sufficient. You just answer counsel's questions.

The Witness: What was your question, sir?

The Court: He just asked you to identify it and [110] to the extent that he asked you to identify it, you identify it.

A. It is a subordination agreement dated November 3rd, 1951.

The Court: And the other one?

Q. (By Mr. Schessler): And the other, the attachment?

A. Corporation resolution to borrow, dated November 3rd, 1951.

Q. Thank you. Does that refer to the loan, the open line of credit that Mr. Kruse secured from the Bank of America?

A. Yes. These are forms that the manager of the El Monte Bank of America asked him to fill out.

Mr. Schessler: Thank you. Respondent offers these Respondent's Exhibit I in evidence at this time.

Mr. Yardum: No objection.

The Court: Exhibit I is admitted.

The Clerk: Respondent's Exhibit I.

(Respondent's Exhibit I was received in evidence.)

Q. (By Mr. Schessler): I believe you previously testified that Mr. Kruse borrowed money from the Bank of America?

A. The corporation did.

(Testimony of Fray L. Hobson.)

Q. Excuse me, I'm sorry, the corporation. [111]

Did Mr. Kruse execute notes for these amounts, these loans? A. Yes.

Q. Were these loans, to your knowledge, were these loans paid on time? A. Yes, sir.

Q. Do you have knowledge of that?

Mr. Yardum: Object to the question. The question has been asked and answered.

The Court: He may answer.

Mr. Schessler: I want to be sure that he knows of his own knowledge, your Honor, whether these notes were paid.

A. I know they were paid.

Q. (By Mr. Schessler): On time?

A. Without seeing the notes, I would not know what the due date was.

Q. You are familiar with Mr. Kruse's banking habits, you are familiar with all of his books, aren't you? A. Yes.

Q. Based on this familiarity, was it Mr. Kruse's habit to let notes to the bank and others go beyond the due date? A. No. [112]

Q. Was it his practice to make sure that all amounts owing to third parties were paid on time?

A. Yes.

Q. Did he frequently try to pay amounts within the so-called cash discount period?

A. Are you referring to trade creditors?

Q. Yes.

A. Yes. In his business, however, there is no discount. He paid on invoice, so your question——

(Testimony of Fray L. Hobson.)

Q. I'm glad you clarified the question.

I wasn't too clear on just how to phrase that.

Now this loan to Mr. Kruse of two hundred—note to Mr. Kruse of $200,000.00, to your knowledge, were any payments made up through December, 1953 on it? A. None were made.

Q. Was this a secured—excuse me.

A. By that, you mean payments on principal, do you not?

Q. Yes; that is what I mean.

A. That was covered in the stipulation.

Q. Was this loan a secured loan? A. No.

Q. These assets, I believe, that the loan represented consisted of cash, accounts receivable and inventory.

Were those assets necessary to the operation of [113] Mr. Kruse's business at the — during the transition period? A. The specific assets?

Q. Not necessarily the specific assets, but assets such as cash, accounts receivable and inventory; was it necessary that he have any assets of that type in order to perform, or could he have gone—could the business have functioned with the assets that were exchanged for stock? A. Yes.

Q. It could have? A. Yes.

Q. Do you know, of your own knowledge, that this corporation has ever paid dividends?

A. It has not.

Q. Who were the owners of the stock that was issued in 1950, if you know?

A. Mr. Kruse and his wife.

(Testimony of Fray L. Hobson.)

Q. Were there any other stockholders?

A. No.

Q. At this conference that took place in the Judge's office, was the question of any other stockholders discussed?

A. Not at that conference.

Previously, he had discussed admitting two of his key personnel.

Q. Were you present when he discussed admitting of two of his key personnel? [114]

A. Yes.

Q. Did he do it? A. No.

Q. One further question: Do you know when permission was received from the Corporation Commission to issue stock in this corporation?

A. The stock was issued in August. The date of the permit I do not know.

Q. Was it shortly before the stock was issued? I mean, shortly, I mean a week or two?

A. As a matter of fact, I could not say. It would not have been too long a time.

Q. I see.

A. The incorporation was handled entirely by Judge Wolford, and the dates and the delays and so forth I'm not—are not fixed firmly in my mind.

I took several months to complete it.

Mr. Schessler: I have no further questions, your Honor.

The Court: Have you anything further?

Mr. Yardum: Yes.

(Testimony of Fray L. Hobson.)

Redirect Examination

Q. (By Mr. Yardum): Mr. Hobson, did you, in your capacity as assistant secretary of the corporation or as accountant for [115] the corporation, advise Mr. Kruse on financial and tax matters?

A. Yes.

Q. In 1950 the corporation accrued $9000.00 rent and $9000.00 interest on its books.

The minutes show that their interest didn't start on the note until January 1st, 1951.

Will you explain how that interest was accrued on the books?

A. It was accrued by journal entry.

Q. I beg your pardon.

A. It was accrued by journal entry, as of July 31st, 1950.

Q. Well, I'm asking you what it was accrued for. Was it the interest on the $200,000.00 note?

A. It was recorded as that, yes.

Q. Well, was it an error?

A. It should not have been accrued.

Q. In 1951 the corporation deducted $12,000.00 rent and $12,000.00 interest. That's correct, is it not? A. Yes.

Q. And Mr. Kruse, on his personal return, reported $21,000.00 rent.

Can you explain why that discrepancy?

A. No, other than to attempt to report the income [116] that he felt was necessary to report.

By so doing, an attempt was made to correct.

(Testimony of Fray L. Hobson.)

Q. This thousand dollars a month that the corporation was paying Mr. Kruse as rent, what was that for?

Was that for the Tyler Street mill?

A. It was for the Tyler Street mill. It was for another parcel that contained an office, a hay barn, and it was for another parcel that contained a warehouse.

Q. What's this R.R.S.T. mill mean in the 1951 return, Exhibit H?

A. That is—That is a building that he built to house milling equipment.

Q. Was he supposed to receive rent then in addition to the other rent, the thousand dollars a month?

A. The thousand dollars a month encompassed all of it.

Q. It was all of it?

A. Yes, all of the property that he leased.

Q. I am just trying to find out why he reported $12,000.00 rent income personally in 1952 and in 1953 and $21,000.00 in 1951.

A. The year '51 should have reported 12,000 interest and 12,000 rent, total $24,000.00.

Q. It's an error then?

A. He reported 21,000 as income.

Mr. Yardum: O.K. I have nothing further. [117]

Mr. Schessler: I have no further questions of this witness.

The Court: That's all.

(Witness excused.)

Mr. Yardum: The petitioner has nothing further, your Honor.

Mr. Schessler: At this time, your Honor, the respondent has nothing further to offer but requests a five-minute recess in order to consider the possibility of a motion on the issues.

The Court: Very well. The court will take about a ten-minute recess.

(Short recess.)

Mr. Schessler: At this time, the respondent moves for decision as to one of the issues in question here.

With respect to the adjustments placed in issue by Item A of the statutory notice for 1952 and 1953, the interest deduction, it's apparent here that the pivotal point in issue is whether or not a bona fide indebtedness in these years existed between petitioner and O. H. Kruse.

The testimony that we have had on this issue has been directed entirely towards the form of the challenged indebtedness, and respondent doesn't question form.

The only person who has testified by the petitioner has given testimony actually in his capacity as [118] an accountant, bookkeeper, and he was not fully employed by petitioner.

He became an officer at some time during the, at least prior to the date of the trial.

His duties were to keep books and to file, as an officer, to file certain tax returns, and that only took him three days a month.

[Endorsed]: No. 16663. United States Court of Appeals for the Ninth Circuit. O. H. Kruse Grain & Milling, a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: October 28, 1959.

Docketed: November 6, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16663

O. H. KRUSE GRAIN & MILLING,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

POINTS RELIED UPON BY APPELLANT

The points on which appellant intends to rely on this appeal are as follows:

(1) That the promissory note in the amount of $200,000.00 issued by appellant corporation to O. H. Kruse in payment for certain specified assets having an equal value was intended to be, and was, in fact,

evidence of a bona fide indebtedness of appellant corporation, and not a contribution to capital.

(a) In general.

(b) That the note had a fixed maturity date and was not a demand note, and, therefore, does not permit an inference that a bona fide indebtedness was not intended.

(c) That the fact that the Bank of America required appellant corporation to execute a printed form of subordination agreement does not leave a permissible inference that the payee of the note, O. H. Kruse, did not intend to enforce payment by appellant corporation.

(d) That the fact that appellant corporation's accountant made mistakes in connection with appellant's income tax returns should not be significant in determining whether there was actually a bona fide indebtedness of appellant corporation to O. H. Kruse.

(e) That the fact that the note was unsecured is not significant in determining whether there was, in fact, a bona fide indebtedness.

(f) That the fact that O. H. Kruse failed to testify at the trial is not a significant fact in determining whether or not there was a bona fide indebtedness of appellant corporation.

Dated: November 13, 1959.

/s/ LeVONE A. YARDUM,
Attorney for Petitioner.

Certificate of Service by Mail Attached.

[Endorsed]: Filed November 16, 1959. Paul P. O'Brien, Clerk.

No. 16663

United States
Court of Appeals
for the Ninth Circuit.

O. H. KRUSE GRAIN & MILLING,

Appellant,

-vs-

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S OPENING BRIEF

ENGER & YARDUM
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Beverly Hills, Calif.

Attorneys for Appellant.

TABLE OF AUTHORITIES

[CASES CITED]

STATUTES

No. 16663

United States
Court of Appeals
for the Ninth Circuit.

O. H. KRUSE GRAIN & MILLING,

Appellant,

-vs-

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

Appellant O. H. Kruse Grain & Milling is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office at 1459 North Tyler Street, El Monte, California. This proceeding involves federal income taxes, and the tax returns for the years involved were filed with the

District Director of Internal Revenue for the Sixth District of California. The principal place of business of appellant corporation, O. H. Kruse Grain & Milling, is within the jurisdiction of the Tax Court of the United States and the United States District Court for the Southern District of California, and within the jurisdiction of the Ninth Circuit of the United States Court of Appeals.

The trial took place in the Tax Court of the United States before Honorable James E. Mulroney, Judge presiding, on January 8, 1959, in the Tax Court located in the Federal Building, Los Angeles, California.

PRELIMINARY STATEMENT

The controversy involves federal income taxes proposed to be assessed against the appellant corporation for the taxable years 1952 and 1953, in the amounts of $5,555.28 and $9,048.53, respectively, resulting from the appellee's (Commissioner's) determination that a certain promissory note issued by appellant, in payment for certain assets owned by O. H. Kruse having a value equal to the principal amount of said note, did not evidence a bona fide indebtedness of the appellant within the meaning of Section 23(b) of the Internal Revenue Code of 1939.

Section 23(b) is set out in the appendix on page A.

APPELLANT'S STATEMENT OF FACTS

Appellant is a corporation organized under the laws of the State of California on March 27, 1950, with its principal place of business located in El Monte, California. (Stipulation, See, Tr. p. 24). O. H. Kruse, sometimes referred to in the record as Otto H. Kruse, president of appellant corporation, had been engaged in the hay, grain and feed business for a period of fourteen (14) years prior to 1950. (Stipulation, See Tr. p. 24). In April , 1950, O. H. Kruse and his wife, Helen D. Kruse, formed appellant corporation using the name O. H. Kruse Grain & Milling as the name of the corporation, which was the same name as O. H. Kruse had used in conducting his business as a sole proprietorship. (Stipulation, See Tr. p. 24).

The appellant corporation had an authorized capital stock of $300,000.00, consisting of 3,000 shares of $100.00 par value each. (Stipulation, See Tr. p. 24).

On April 1, 1950, O. H. Kruse transferred to appellant, in exchange for 800 shares of stock, the following property:

(Stipulation, See Tr. pp. 24-25).

Office equipment	$ 1,865.76	
Autos and trucks	57,135.27	
Machinery and equipment	64,113.91	
	$123,114.94	
Less accrued depreciation	44,050.41	$79,064.53
Prepaid insurance		4,163.67
Insurance deposits less accrued premiums		2,293.48
Cash		4,270.55
		$89,792.23

In this transaction petitioner assumed liabilities of O. H. Kruse, as follows: (Stipulation, See Tr. p. 25).

Notes payable (bank)	$8,000.00
Accounts payable (trade)	1,710.00
Accrued payroll taxes (due 12/31/50)	82.23
	$9,792.23

The minutes of the meeting of June 15, 1950 of the Board of Directors of the petitioner corporation (appellant's Exh. 5) show the following:

> Mr. Kruse then stated that he had advanced funds to the corporation for working capital, and that he would be willing to accept the corporation's promissory note for $200,000.00 payable December 31, 1950, to bear interest at the rate of 6% per annum beginning January 1, 1951, if the note should be unpaid on that date. The balance of the advance could be carried as an open account. Payments to Mr. Kruse, other than those on the promissory note, should be applied first to accrued interest, secondly to accrued rental, and then to the open account.

The following resolution is also contained in these minutes:

> RESOLVED: That the officers of the corporation be directed to execute a promissory note in the amount of $200,000.00, payable to Mr. O. H. Kruse, payable on December 31, 1950, and to bear interest at the rate of 6% per annum if unpaid on January 1, 1951.

O. H. Kruse conveyed the following assets to the appellant corporation and accepted in payment therefor its promissory note in the principal sum of $200,000.00 and an open account in his favor in the amount of $18,579.29: (Stipulation, See Tr. p. 25).

Accounts Receivable	$139,506.62
Merchandise Inventory	37,724.59
Cash	41,348.08
	$218,579.29

In addition to the tangible assets transferred by O. H. Kruse to the appellant corporation in exchange for 800 shares of its capital stock; its promissory note in the amount of $200,000.00, and an open book account in his favor of $18,579.29, the said O. H. Kruse transferred intangible assets, including good will, and contracts with various feeding associations in the Bellflower, San Dimas, Chino Valley and Baldwin Park areas, whose members buy from one source. (Tr. pp. 57 & 58). The cooperative guarantees the accounts

receivable representing purchases by its members, who buy on terms that are substantially equivalent to cash, (ten to fifteen day accounts). They will guarantee a mark-up over the current grain quotations to the producers of the feed. (Tr. pp. 61 & 62). Mr. Kruse received nothing from the corporation for these intangible assets. (Tr. pp. 59 & 63).

Appellant kept its books and reported its income and expenses in its federal income and excess profits tax returns on the accrual basis of accounting. (Joint Exhibits G, 17A, 18B).

The corporate journal entry for each month of 1952 and 1953 shows a debit to "Interest" or "Interest Expense" and a credit to "Accrued Interest." These monthly journal entries were posted to ledger sheets entitled "Accrued Interest." (See Exhibits 7 through 14, inclusive).

Appellant had a line of credit of $100,000.00 with the Bank of America established on November 3, 1951, and on said date O. H. Kruse and Helen D. Kruse signed a subordination agreement subordinating the $200,000.00 note obligation to any existing loan with the bank. (Exh. I, Tr. pp. 138, 139 & 140).

In 1950, appellant corporation deducted accrued interest of $9,000.00 and accrued rent of $9,000.00, both

payable to O. H. Kruse. (Exh. G).

In 1951, appellant corporation deducted $12,000.00 interest payable to O. H. Kruse, and O. H. Kruse (Tr. p. 143), who reported his income on the cash method of accounting at all times, reported no interest received from appellant corporation but incorrectly reported $21,000.00 as rental income. Nothing was actually paid on interest during 1951 by appellant corporation to O. H. Kruse. (Exh. H).

In 1952, appellant corporation deducted accrued interest of $12,000.00 owing to O. H. Kruse. (Joint Exh. 17A). In this year O. H. Kruse reported only $6,000.00 interest received from appellant corporation. Nothing was actually paid on interest during 1952. (Joint Exh. 19C).

In 1953, appellant corporation deducted accrued interest of $12,000.00 owing to O. H. Kruse. (Joint Exh. 18B). O. H. Kruse reported $12,000.00 interest received from appellant in 1953. (Joint Exh. 20D).

Appellant paid $2,000.00 interest in September, 1953, to O. H. Kruse. (Exh. 14). Payment of appellant corporation's note to O. H. Kruse was made in installments as follows: (Stipulation, See Tr. p. 26).

November 1, 1955	$100,000.00
April 12, 1957	20,000.00
October 22, 1958	80,000.00

All other pertinent facts relating to the predecessor business of Otto H. Kruse, and the sale of that business to the appellant are contained in the Stipulation of Facts; Transcript of Record, pages 56, 57, 58, 61, 62, 71, 72, 75 and 76; and appellant's Exhibits 5 and 6.

The promissory note involved herein was received in evidence by the Court as appellant's Exhibit 1. (See appendix p. B).

All other pertinent facts relating to the issuance of the said note are contained in the Transcript of Record, pp. 105 and 106, and appellant's Exhibits 5 and 21, and appellee's Exhibit I.

The facts relative to the accrual of interest on the said promissory note on the books of appellant corporation are contained in appellant's Exhibits 7, 10 and 14.

The amounts reported by O. H. Kruse in his individual income tax returns for the years 1951, 1952 and 1953 are shown in joint Exhibits 19C and 20D.

Fray L. Hobson, accountant, admits errors in preparing personal federal income tax returns for O. H. Kruse for the years 1951 and 1952. (Tr. p. 138).

The said Fray L. Hobson was elected assistant secretary of the appellant corporation at a regular

meeting of its board of directors held on June 15, 1950. (Appellant's Exh. 5).

ISSUE TO BE DECIDED

Whether the promissory note in the amount of $200,000.00 issued by appellant corporation to O. H. Kruse in payment for certain specified assets having an equal value was intended to be a bona fide indebtedness of appellant corporation or a contribution to capital.

POINTS RELIED UPON BY APPELLANT

Appellant relies upon the following points on appeal:

(1) That the promissory note in the amount of $200,000.00 issued by appellant corporation to O. H. Kruse in payment for certain specified assets having an equal value was intended to be, and was, in fact, evidence of a bona fide indebtedness of appellant corporation, and not a contribution to capital.

(a) In general.

(b) That the note had a fixed maturity date and was not a demand note, and, therefore, does not permit an inference that a bona

fide indebtedness was not intended.

(c) That the fact that the Bank of America required appellant corporation to execute a printed form of subordination agreement does not leave a permissable inference that the payee of the note, O. H. Kruse, did not intend to enforce payment by appellant corporation.

(d) That the fact that appellant corporation's accountant made mistakes in connection with appellant's income tax returns should not be significant in determining whether there was actually a bona fide indebtedness of appellant corporation to O. H. Kruse.

(e) That the fact that the note was unsecured is not significant in determining whether there was, in fact, a bona fide indebtedness.

(f) That the fact that O. H. Kruse failed to testify at the trial is not a significant fact in determining whether or nor there was a bona fide indebtedness of appellant corporation.

ARGUMENT

I

THE PROMISSORY NOTE IN THE AMOUNT OF $200,000.00 ISSUED BY APPELLANT CORPORATION TO O. H. KRUSE IN PAYMENT FOR CERTAIN SPECIFIED ASSETS HAVING AN EQUAL VALUE WAS INTENDED TO BE, AND WAS, IN FACT, EVIDENCE OF A BONA FIDE INDEBTEDNESS OF APPELLANT CORPORATION.

(a) IN GENERAL

The promissory note dated June 15, 1950, involved in this proceeding, in the principal sum of $200,000.00, and bearing interest at the rate of 6% per annum, was drawn on a form usually used only for that purpose. (Exh. 1; see appendix p. B). Words common to an evidence of an indebtedness are used throughout. It was properly recorded on the books of appellant corporation as an obligation, and correctly reflected on the financial statements furnished by appellant to the banks and others. (Exhibits F, G, 17A, 17B and I).

In the case of John Wannamaker of Philadelphia, 1 TC 944, the Court said:

> "It is the generally accepted rule that the name given to the instrument is not conclusive and that inquiry may be made as to its real character, but it is not lightly to be assumed that the parties have given an erroneous name to the transaction."
>
> (Underscoring ours).

A condensed expression of the same view is stated in the case of Clyde Bacon, Inc., 4 TC. 1107, citing Commissioner v Proctor Shop, Inc., 82 Fed. (2d) 792; Jewel Tea Co. v United States, 90 Fed. (2d) 451; Kentucky River Coal Corporation, B. T. A. 644.

Many different tests have been applied by the courts in reaching an opinion as to the recognition of a note as evidence of indebtedness, as opposed to risk capital. Those which have been most frequently applied are:

(a) Was there a good business purpose for the issuance of the note?

In the instant case the note was issued for assets having a value equal to the principal amount of the note. (Stipulation).

(b) Is the obligation to pay positive and unconditional, or subject to a contingency?

The promissory note issued to O. H. Kruse by the appellant corporation for certain of his assets constituted evidence of an indebtedness founded upon a positive obligation to pay. O. H. Kruse was entitled, independently of the risk of success of the business, to the return of the money loaned, and the full amount of the note has been paid to him.

Of interest on this subject is the case of Wilshire & Western Sandwiches, Inc., v Comm., 175 F (2d) 718, C.A.

9th. The board of directors of the plaintiff decided that of the $55,000.00 actually advanced by the incorporators, $25,000.00 would be taken as loans, and $30,000.00 would be taken as capital contributions for which stock was issued. Promissory notes, maturing in two years with interest at 6% payable quarterly, were issued for the loans. No interest was in fact paid until December, 1943, apparently after the notes became due, when it was paid through November, 1943. The principal was paid in installments on April 21, 1943, May 23, 1944, and March 23, 1945, at which time the remaining interest was also paid. The amount of the loans was not set up on the corporation's books as indebtedness because the accountant was not informed that part of the advances made by the incorporators was made as loans.

One of the incorporators testified that he expected to be repaid if the corporation had funds for that purpose, and another testified that he expected to be paid out of current earnings and would not have insisted upon payment if it would cause financial hardship to peritioner. The interest and principal was paid from earnings.

The Court, in its opinion, stated:

> "It is not contended that a corporation is without power to enter into a debtor and creditor relationship with its stockholders."

It held that the advances were loans and that the interest paid thereon was deductible under Section 23(b) Internal Revenue Code, 1939.

(c) Does the note bear interest?

The promissory note issued by the appellant corporation with which we are concerned bore interest at the rate of 6% per annum from January 1, 1951. It was only non-interest bearing for the first 6 1/2 months, that is, from June 15, 1950, to December 30, 1950. (Exh. 1; see appendix p. B).

In Ruspyn Corporation, 18 TC 769, debenture bonds at issue were held by the Tax Court to be a valid indebtedness of the corporation. The Tax Court found that under the terms of the debenture bonds, they mature on May 1, 2019, or in something more than 89 years after their issuance, and 4 years after the expiration of the lease covering petitioner's principal asset. Also, that for the first 6 years interest was payable only if earned, and any unearned interest did not accumulate. The Court's opinion contains no information as to whether the officers of the corporation gave any testimony regarding the unusual terms of the debentures, which would serve to explain them.

In Commissioner v Page Oil Co., 129 F 2d 748, (C.A.2), affirming 41 B. T. A. 952, the payees of the notes in question agreed that the notes would bear no interest

until the year 1934 which was 4 years after their issuance. This was not held fatal to a valid indebtedness.

(d) Does the note carry voting rights?

The note at issue carried no voting rights under any conditions.

(e) Was there a substantial investment in capital stock?

It has been stipulated as a fact that the appellant corporation received valuable consideration for the issuance of its promissory note to O. H. Kruse. The record discloses that the appellant corporation issued $80,000.00 par value of its capital stock for assets having an equal value (Stipulation, see Tr. pp. 24 and 25; and Tr. p. 57), and that O. H. Kruse contributed intangible assets having a reasonable value of $200,000.00 to the appellant corporation for no consideration. (Tr. pp. 58, 59 and 63).

The Tax Court, in its written opinion, applies some different tests in reaching its opinion that the note in question is not a bona fide evidence of indebtedness. The Tax Court's opinion will be answered hereinafter under (b), (c), (d), (e) and (f) of this brief.

Of particular interest to the general question at bar is the case of Chas. Schaefer & Son, Inc., 9 T.C.M. 17964. The petitioner therein was engaged in business as

a wholesaler, dealing in hay, grain, flour, and salt, and took over a business originally conducted as a proprietorship. The corporation had capital stock issued in the amount of $86,437.14, and issued notes in the aggregate principal sum of $300,000.00, bearing interest at the rate of 7% per annum. The said notes did not have to be paid for 50 years, but they could be paid sooner. Interest was to be paid as and when declared by the board of directors. It was provided that, "The Board of Directors shall declare interest payable when and as the net income of the corporation will permit."

The Court, in deciding this issue in favor of the taxpayer, observed that the time of maturity, while distant, was not unreasonable under the circumstances; also, that the payment of interest currently was made to depend upon earnings, but the obligations evidencing the indebtedness could nevertheless be notes.

In the instant proceeding the note involved became payable on demand after December 31, 1950, (Exh. 1). One-half of the principal amount of the note was paid in 1955, and the remainder was liquidated by payments made in 1957 and 1958. (Stipulation, See Tr. p. 26). Interest was payable on such notes regardless of whether or not there were corporate earnings out of which it could be paid, and no action by the Board of Directors was required

before payment could be made.

It is submitted that all of the general tests used in deciding an issue such as the one at bar are resolved favorably towards appellant, and the tests set forth in the opinion of the Tax Court, and the inference made therefrom (hereinafter discussed) are without merit.

(b) THE NOTE HAD A FIXED MATURITY DATE AND WAS NOT A DEMAND NOTE, AND, THEREFORE, DOES NOT PERMIT AN INFERENCE THAT A BONA FIDE INDEBTEDNESS WAS NOT INTENDED.

After stating that one of the factors to consider in determining whether a bona fide indebtedness was intended is the presence or absence of a fixed maturity date for the instrument, the Tax Court, in its opinion, states that the note at bar was a demand note. (Opinion, See Tr. p. 35). It is submitted that the note had a definite maturity date and that is December 31, 1950. The note provided for payment "on or before December 31, 1950."

Even if the note may be considered as a demand note, it is still valid evidence of a bona fide indebtedness. See, Commissioner v. Page Oil Co., Supra.

The Tax Court appears to accept such law when it states that "We need not say that in all cases a demand note given to a stockholder would not evidence an indebtedness." (Opinion, See Tr. pp. 35 and 36). However, it supports its conclusion by citing Gooding Amusement Co.,

23 T. C. 408 and the affirming opinion in Gooding Amusement Co. v. Commissioner, 236 F 2d 159. (Opinion, See Tr. p. 25). That portion of the Gooding Amusement Co. case cited by the Tax Court does not deal with the subject of whether the note is a demand note or one with a fixed maturity. It deals with impairing the financial standing of the corporation. The Tax Court opinion follows by a statement that the Gooding Amusement Co. case points up the failure of Mr. Kruse to testify (this argument will be discussed infra), and the "unexplained terms of the note." It is submitted that the clear and concise language of the note leaves no "unexplained terms."

It appears to appellant that Gooding Amusement Co., supra, is clearly distinguishable on the facts. For one thing, depreciable assets carried on the partnership books in the Gooding case which had a value of $129,899.13 were transferred to the corporation at a value of $247,832.23. Secondly, no cash was transferred to the corporation, but assets valued at only $184,444.23 were transferred to the corporation for only $49,000.00 of its capital stock and promissory notes which totaled $232,001.10. It can immediately be seen that the figures are disproportionate which is something we do not have in the case at bar. In the instant case the note was

received for assets having an equal value. Another distinguishing factor is that the portion of the assets contributed for the shares of stock in the Gooding case and that contributed for the notes was not identified. In addition, the court in the Gooding case based its reasoning in part upon the fact that the petitioner's wife and infant daughter were amenable to petitioners' desires with respect to the notes. Since petitioner's wife and infant daughter didn't need the funds it was immaterial to them whether the notes were paid or not.

The Courts have recognized that the consecutive steps involved in the incorporation of a business, occurring in immediate sequence, may nevertheless be entirely different in nature and therefore separate and distinct legal transactions, although closely related in time and purpose. Sun Properties, Inc. vs. U. S., 220 Fed. (2d) 171; Marjorie Taylor Hardwick, 33 B.T.A. 249; W. A. Hoult, 23 B.T.A. 9-4.

See also Warren H. Brown, et al., 27 TC 27

(c) THE FACT THAT THE BANK OF AMERICA REQUIRED APPELLANT CORPORATION TO EXECUTE A PRINTED FORM OF SUBORDINATION AGREEMENT DOES NOT LEAVE A PERMISSABLE INFERENCE THAT THE PAYEE OF THE NOTE, O. H. KRUSE, DID NOT INTEND TO ENFORCE PAYMENT BY APPELLANT CORPORATION.

The Tax Court in its opinion (See Tr. p. 36) states

that the "unexplained terms of the note instrument leaves a permissable inference that O. H. Kruse, at the time he had his corporation issue the note to him, did not intend to enforce payment by his corporation if by so doing his corporation would be at all inconvenienced." The Tax Court proceeds to state that "This inference is somewhat strengthened by the subordination agreement executed by O. H. Kruse and his wife in November, 1951 with the Bank of America at the time the corporation established a $100,000.00 line of credit with the bank." (Opinion, See Tr. p. 36).

While making this inference, the Tax Court has not suggested that it was unusual practice for a bank to require such an agreement in the case of an unsecured loan. The Tax Court has also not seen fit to attempt to distinguish the facts relating to such subordination agreement (Exh. I), in the instant case, from those found by the Courts in the many cases where such an agreement was found to exist, some of which are listed below.

John Kelley Company v. Commissioner, 326 U.S. 521; 66 S.Ct. 299 affirming 1 T.C. 457 (Payment of debentures was conditioned on the sufficiency of net income to meet the obligation, and the debenture holders were subordinated to all other creditors).

Clyde Bacon, Inc., supra.

Proctor Shop, Inc., 30 B.T.A. 721; affirmed C. A. 9th; 82 Fed (2d) 795

John W. Walter, Inc., 23 T.C. 550

In the Walter case, supra, Dun and Bradstreet refused to give the corporation a credit rating until John W. Walter and the corporation signed a subordination agreement whereby the corporate debentures were subordinated to the claims of Dun and Bradstreet, and general creditors. The debentures could not be sold or retired without giving creditors ninety days notice. The Tax Court in its opinion said:

> "Our finding that the Petitioner received valuable consideration for the issuance of its debentures disposes of the issue in Petitioner's favor."

Commissioner v. Page Oil Co., 129 Fed (2d) 748; (C.A. -2) affirming 41 B.T.A. 952. In this case the Court found that Page Oil Co., in 1930, acquired certain oil and gas properties in exchange for all of its capital stock (1,600 shares); its note for $161,650.00 due on demand with interest, and four subordinate notes each in the amount of $500,000.00, payable on demand, on or after five years from date with interest at 6% per annum. Each note contained the provision:

> "This note is given in payment of a part of the purchase price of oil and gas premises and is subordinate in payment to a series of notes

aggregating Three Hundred Four Thousand Two Hundred Seventy Six Dollars Forty Cents and is likewise subordinate in payment to any notes which may be made by this company for the purpose of paying the cost of developing any oil or gas property owned by it."

The payee of the notes also agreed that the notes would bear no interest until 1934 (four years after issuance), and that they would be subordinated to payments on a mortgage on the property purchased and to the payment of the operating expenses of the corporation.

In its opinion, the Court said:

> "In Commissioner v. O. P. Holding Corp., 76 Fed. (2d) 11, we had occasion to deal with a similar situation involving subordinated debenture bonds instead of notes. We then said: 'We do not think it fatal to the debenture holder's status as a creditor that his claim is subordinated to those of general creditors.'"

Another inference indulged in by the Tax Court, which is closely aligned with the subordination agreement, is the statement in its opinion (see Tr. p. 38) that although the appellant corporation paid its obligations other than the note at issue promptly, it made no payment on the principal on this note until November, 1955. The answer to this is found in the opinion of the Court in Bakhaus & Burke, Inc., 14 TCM 919, which reads in part, as follows:

"Lastly respondent relies upon the failure of the stockholder creditors to demand payment of the debt. The following language from Earle v. W. J. Jones & Son, 200 Fed (2d) 846, 850 is particularly dispositive of this contention:

'***Certainly failure to attempt to collect a debt does not per se destroy its character as such; and the same strict insistence upon payment on the due date as would be the case if a bank were the creditor should not be expected where a shareholder, or one who is closely identified therewith, is a creditor.***'

(d) THE FACT THAT APPELLANT CORPORATION'S ACCOUNTANT MADE MISTAKES IN CONNECTION WITH APPELLANT'S INCOME TAX RETURNS SHOULD NOT BE SIGNIFICANT IN DETERMINING WHETHER THERE WAS ACTUALLY A BONA FIDE INDEBTEDNESS OF APPELLANT CORPORATION TO O. H. KRUSE.

Particular emphasis, we believe, is placed by the Tax Court upon certain mistakes made by appellant's accountant. (Opinion, See Tr. pp. 36, 37, 38, 39 and 40).

Through error, interest was accrued on the appellant's books for the nine months period of the corporate existence in 1950, although, by the terms of the note, no interest was due for that period. This error had been corrected, and the additional tax due as a result of the correction paid, prior to the commencement of

the revenue agent's examination of the appellant's books and records for the years 1952 and 1953.

There are errors in the Federal income tax returns of O. H. Kruse and his wife for the year 1951 (Exh. H), which year is not involved in this proceeding, and 1952 (Exh. 19C), which is one of the years involved herein. They are incomprehensible errors which bear no relation to the deductibility of the interest on the appellant's note. This is particularly true in view of the Court's finding that the doctrine of constructive receipt was applicable with respect to the rental accruals.

The error in 1951 resulted from the accountant's action in reporting the sum of $21,000.00 as income from rent in the personal return of O. H. Kruse and his wife, although the only amount of rent due and payable at the close of 1951 was $12,000.00 (Exh. 5), and in complete disregard of the order of the appellant's board of directors that payments made to O. H. Kruse should be first applied to accrued interest on the note. (Exh. 5).

Clearly, $12,000.00 of the amount reported ($21,000.00) represented interest, and only the balance was applicable to the accrued rent.

In 1952, the accountant who prepared the personal

return of O. H. Kruse and his wife reported therein the amount of $12,000.00 as rental income and $6,000.00 as interest income (Exh. 19C), in disregard of the specific instructions of the appellant's board of directors. (Exh.5).

It has long been established that income is to be determined from actual facts, as to which books of account are only evidential.

Doyle v. Mitchell Bros., 247 U.S. 179
Southern Pacific Co. v Muenter (C.A. --9)
Cert. denied U.S. 611
Duffin v Lucas, 55 Fed (2d) 786
Clarence E. Baldwin v. Comm. 14 T.C.M. 694

The following statement of the Court in Commissioner v. Columbia River Paper Mills, (C.A. --9) 126 F (2d) 1009, is deemed to be equally applicable to the facts in the instant case:

> "There is no occasion for placing a strained construction upon the statute, or for subjecting the simple agreement to an accountant's interpretation. As said in Old Colony Railroad Co. v. Comm., 284 U.S. 552, 561; 52 S. Ct. 211, 214, 76 L. Ed. 48, we think that, in common understanding interest means what is usually called interest by those who pay and those who receive the amount so denominated in bond and coupon and that the words of the statute permit the deduction of that sum, and do not refer to some esoteric concept derived from subtle and

theoretic analysis."

Appellant urges the Court to look to the substance and form of the note and the facts surrounding the execution of the note, rather than to decide against appellant by inferences drawn from incomprehensible errors which could not possibly have been made by the accountant for any specific purpose. In other words, it is submitted that the only inference that can be drawn from the facts is that there were mistakes and that to then infer from the mistakes that a bona fide indebtedness was not intended, is piling inference upon inference similar to double hearsay where one person testifies that Mr. X told him that Mr. Y told him that such and such occurred.

(e) THE FACT THAT THE NOTE WAS UNSECURED IS NOT SIGNIFICANT IN DETERMINING WHETHER THERE WAS, IN FACT, A BONA FIDE INDEBTEDNESS.

An unsecured note was held in each of the following cases to be a bona fide indebtedness of the corporation rather than a contribution to capital. See, John Kelley Co. v. Comm., 326 U.S. 521; Comm. v. Page Oil Co., supra; Comm. V. Proctor Shop, Inc., supra; Chas. Schaefer & Son, Inc., supra; Sun Properties, Inc. v. U. S., supra; Bakhaus & Burke, Inc., supra.

It is submitted by appellant that citation of authority to the effect that an unsecured debt is just as much a debt as one that is secured is wholly unnecessary.

(f) THE FACT THAT O. H. KRUSE FAILED TO TESTIFY AT THE TRIAL IS NOT A SIGNIFICANT FACT IN DETERMINING WHETHER OR NOT THERE WAS A BONA FIDE INDEBTEDNESS OF APPELLANT CORPORATION.

The trial court noted that the "significant fact" in this case is that petitioner sought to establish its burden without the testimony of O. H. Kruse. (Opinion, See Tr. 33). The Court stresses the failure of O. H. Kruse to testify "for the unexplained terms of the note instrument leaves a permissable inference that O. H. Kruse, at the time he had the corporation issue the note in question to him, did not intend to enforce payment by his corporation if by so doing, the corporation would be at all inconvenienced." (Opinion, See Tr. 8-26). There is no basis for drawing such an inference. It is respectfully submitted that the Tax Court should not be encouraged to indulge in metaphysical gymnastics in an effort to sustain the Government's position.

In the case of Bakhaus and Burke, Inc., 14 TCM, Decision 21, 185 [M], the Tax Court said:

> "The question whether the sum transferred gave rise to an indebtedness or to a proprietory

interest depends upon the objective intent disclosed by all the pertinent factors in the case and not the formal manifestations of intent declared by the taxpayer. Isidor Dobkin, 15 T.C. 31, aff'd 192 Fed (2d) 392,; Cf. Wilshire & Western Sandwiches, Inc. v. Commissioner, 175 Fed. (2d) 718."

Considered in the light of that pronouncement, it is difficult to imagine what purpose the personal testimony of O. H. Kruse would have served, since the terms of the note are clearly stated therein; the books of account of appellant reflect the existence of the obligation, and the proper accrual of interest thereon for the years 1951, 1952, 1953, and thereafter.

Although the trial court refers to the "unexplained terms" of the note, the note is clear and concise. It is not clear to appellant as to what Mr. O. H. Kruse could have testified to other than what is presently evidenced by the fact that appellant was organized to take over his business and that he offered to transfer certain of his assets to the corporation in exchange for its capital stock and most of his remaining assets for a promissory note, all of which is set forth in the minutes of the meetings of appellant, the note and the signed proposal, and all of which have been received in evidence and heretofore referred to.

The Tax Court seeks to imply that for reasons of

his own O. H. Kruse did not choose to testify in court as to his intent, and, that this may be considered as evidence under the well established rule that when a party fails to introduce evidence within his possession and which, if true, would be favorable to him, the presumption is that such evidence, if produced, would be unfavorable and this is especially true where the party failing to produce the evidence has the burden of proof. It must be kept in mind that in the instant case, we are concerned with written agreements entered into by and between O. H. Kruse and appellant. (Exhibits 1, 3, 4 and 5). Those agreements have been introduced in evidence by appellant, together with the promissory note. Uncontradicted testimony was given at the trial that O. H. Kruse was represented by his legal advisor, Judge Wolford. (Tr. pp. 75-78 inclusive).

In the case of Sherman v. Commissioner, (C.C.A. 9th) 76 Fed (2d) 810, it was held that the intention of parties to an agreement must be determined from its terms and testimony of the parties that they intended to cover subjects not included therein must be disregarded. See also the case of Pugh v. Commissioner of Internal Revenue, 49 Fed (2d) 76, (C.C.A. 5th) certiorari denied, 284 U.S. 642, and Jurs v Commissioner 147 Fed (2d) 805 (C.C.A. 9th) affirming TC Memo Opinion

C. C. H. Dec. 13446 [M].

No case could be found by appellant which involved the question of whether a note should be recognized as evidence of indebtedness where the court relied upon the testimony of a principal involved in making a finding as to the bona fides of the note.

In Isidor Dobkin, 15 T.C. 31 --- affirmed 192 Fed (2d) 392, it was stated as follows:

> "The determinative intent described in Wilshire & Western Sandwiches, Inc., 175 Fed (2d) 718, must necessarily be the objective intent disclosed by all the pertinent factors in the case and not the formal manifestation of intent declared by the taxpayer. Cf O'Neill v. Commissioner, 170 Fed (2d) 596 (48-2 USTC 9406) certorari denied 336 U. S. 937."

SUMMARY

The only question to be answered in this case is whether the promissory note in the sum of $200,000.00 issued by the appellant corporation to O. H. Kruse in exchange for assets having a value equal to that amount was a bona fide obligation of the appellant evidencing a true debtor-creditor relationship, within the meaning of Section 23(b), Internal Revenue Code (1939).

The note was drawn on the form usually used only for such purpose, and using only words commonly serving

to denote an evidence of indebtedness. It became due and payable on December 31, 1950, and, if not paid on that date it became payable on demand. The note bore interest at the rate of 6% per annum, if not paid on or before December 31, 1950.

It was properly recorded on the books of the appellant and reflected in its financial statements given to the banks and others.

Interest on the note was properly accrued on the books of the appellant for each of the years 1951, 1952 and 1953, and subsequent years, which books have, at all times, been kept on the accrual basis.

The Board of Directors of appellant corporation, at a meeting held on June 15, 1950, adopted a resolution providing that payment made to O. H. Kruse should be applied first to the payment of interest on the appellant's note held by him and next to the payment of rent due.

The Tax Court in the instant case held that the rental payments accrued on the books of the appellant in favor of O. H. Kruse were constructively received by him in the year in which the rental expense was accrued on the appellant's books. The reasoning of the Court would apply with equal force to the interest accrued on the appellant's books in favor of O. H. Kruse.

The personal income tax returns of O. H. Kruse for the years 1951, 1952, and 1953 were prepared by a certified public accountant who has admitted making errors in the designation of the amounts reported as income received from the appellant in 1951 and 1952. In the year 1953 the nature of the income reported was correctly stated.

This is not a case where the misnaming of the nature of the income reported by O. H. Kruse as constructively received from the appellant had some effect on his Federal income tax liability, since the entire amount was taxable to him whether described as interest or rental income.

It is urged that the errors of an accountant in failing to correctly designate the nature of the amounts reported by O. H. Kruse in his personal return, which were constructively received from the appellant, in accordance with the resolution of the board of directors of the appellant, adopted at the meeting held June 15, 1950, should have no bearing on the question at issue.

C O N C L U S I O N

For the foregoing reasons, the judgment of the Tax Court of the United States should be reversed.

Respectfully submitted,

ENGER & YARDUM

BY: LeVONE A. YARDUM

Attorneys for Appellant.

APPENDIX

"In computing net income there shall be allowed as deductions:"

"Section 23 (b) Interest -- All interest paid or accrued within the taxable year on indebtedness incurred within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from the taxes imposed by this chapter."

Internal Revenue Code of 1939, Section 23 (b)

$ 200,000.00 June 15, 19 50

On or before December 31, 1950 or thereafter on demand after date, for value received,

O. H. Kruse Grain & Milling, a corporation

promises to pay to Otto H Kruse

or order at El Monte, California

the sum of Two Hundred Thousand Dollars Dollars

with interest at the rate of six per cent per annum from January 1, 1951 until paid, interest payable semi-annually, and if not so paid to be compou[illegible], and bear the same rate of intere[illegible] e principal; and should the interest not be paid then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in lawful money of the United States.

This note is executed in compliance with a resolution of the Board of Directors of said Corporation, duly adopted at a regular meeting of said Board and transcribed in full in the minutes of said meeting.

O. H. Kruse Grain & Milling

[SEAL]

By O. H. Kruse
President

Attest: Fray S. E. Hoban
Asst. - Secretary

NOTE — CORPORATION — WOLCOTTS FORM 1440

B

No. 16663

In the United States Court of Appeals for the Ninth Circuit

O. H. KRUSE GRAIN & MILLING, a corporation,
PETITIONER

v.

OMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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INDEX

CITATIONS

Cases—Continued Page

Statute:

In the United States Court of Appeals for the Ninth Circuit

No. 16663

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v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

---

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court (R. 26-41) are not officially reported.

JURISDICTION

This petition for review (R. 43-47) involves federal income taxes for the calendar years 1952 and 1953. On October 29, 1956, the Commissioner of Internal Revenue mailed to the taxpayers a notice of deficiency in the amount of $13,994.26 for the year 1952, and $19,192.33 for the year 1953. (R. 3,

22.) Within ninety days thereafter and on January 28, 1957, the taxpayer filed a petition with the Tax Court for a redetermination of deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 3-22.) The decision of the Tax Court was entered on August 7, 1959. (R. 42.) The case is brought to this Court by a petition for review filed September 14, 1959. (R. 43-47.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether an alleged promissory note issued in 1950 by the taxpayer-corporation to O. H. Kruse, who, with his wife jointly owned all of the taxpayer-corporation's outstanding stock, was a true indebtedness so that accrued interest thereon during the years 1952 and 1953 would be deductible under the provisions of Section 23(b) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations (other than obligations of the United States issued after Septem-

ber 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from the taxes imposed by this chapter.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

STATEMENT

The facts relevant to this appeal, as found by the Tax Court (R. 28-33), are not in dispute, and may be summarized as follows:

The taxpayer in this case is a corporation organized under the laws of the State of California. It filed its corporate income tax returns for the years 1952 and 1953 with the District Director of Internal Revenue at Los Angeles, California. (R. 28.)

O. H. Kruse, sometimes referred to in the record as Otto H. Kruse, president of the taxpayer corporation, engaged in the hay, grain and feed business as an individual proprietor for fourteen years prior to 1950. In April 1950, Kruse formed the taxpayer corporation, using the same name—O. H. Kruse Grain & Milling—as O. H. Kruse had used in conducting his business as a sole proprietorship. The taxpayer corporation had an authorized capital stock of $300,000, consisting of 3,000 shares of $100 par value each. On April 1, 1950, O. H. Kruse transferred to the taxpayer corporation the following property in exchange for 800 shares of stock issued to himself and his wife jointly * (R. 28, 34):

---

* In the interest of simplicity, O. H. Kruse will be referred to hereinafter as the sole stockholder.

Office equipment	$ 1,865.76	
Autos and trucks	57,135.27	
Machinery and equipment	64,113.91	
	$123,114.91	
Less accrued depreciation	44,050.41	$79,064.53
Prepaid insurance		4,163.67
Insurance deposits less accrued premiums		2,293.48
Cash		4,270.55
		$89,792.23

In this transaction the taxpayer corporation assumed liabilities of O. H. Kruse, as follows (R. 29):

Notes payable (bank)	$8,000.00
Accounts payable (trade)	1,710.00
Accrued payroll taxes (due 12/31/50)	82.23
	$9,792.23

The minutes of the meeting of June 15, 1950, of the board of directors of the taxpayer corporation show the following (R. 29):

> Mr. Kruse then stated that he had advanced funds to the corporation for working capital, and that he would be willing to accept the corporation's promissory note for $200,000.00 payable December 31, 1950, to bear interest at the rate of 6% per annum beginning January 1, 1951, if the note should be unpaid on that date. The balance of the advance could be carried as an open account. Payments to Mr. Kruse, other than those on the promissory note, should be applied first to

accrued interest, secondly to accrued rental, and then to the open account.

The following resolution is also contained in these minutes (R. 29-30):

> RESOLVED: That the officers of the corporation be directed to execute a promissory note in the amount of $200,000.00, payable to Mr. O. H. Kruse, payable on December 31, 1950, and to bear interest at the rate of 6% per annum if unpaid on January 1, 1951.

O. H. Kruse conveyed the following assets to the taxpayer corporation and accepted in payment therefor its promissory note in the principal sum of $200,000 and an open account in his favor in the amount of $18,579.29 (R. 30):

Accounts receivable	$139,506.62
Merchandise inventory	37,724.59
Cash	41,348.08
	$218,579.29

The $200,000 note, dated June 15, 1950, provided for the payment of the $200,000 "On or before December 31, 1950 or thereafter on demand", and bore interest at the rate of 6 per cent "from January 1, 1951 until paid, interest payable semi-annually." A corporate journal entry for each month of 1952 and 1953 shows a debit to "Interest" or "Interest Expense" and a credit to "Accrued Interest." These monthly journal entries were posted to ledger sheets entitled "Accrued Interest." (R. 30.)

The taxpayer corporation established a line of credit of $100,000 with the Bank of America on

November 3, 1951, and on said date O. H. Kruse and Helen D. Kruse signed a subordination agreement subordinating the $200,000 note obligation to any existing loan with the bank. In said agreement O. H. Kruse and his wife agreed not to sue, collect or receive payment upon any claim, nor interest thereon, which they held against taxpayer so long as taxpayer owned the bank. (R. 30-31.)

In 1950, the taxpayer corporation deducted accrued interest of $9,000 payable to O. H. Kruse. (R. 31.)

In 1951, the taxpayer corporation deducted $12,000 interest payable to O. H. Kruse. O. H. Kruse, who reported his income on the cash method of accounting at all times, reported no interest from the taxpayer corporation in 1951. No interest was actually paid in 1951. (R. 31.)

In 1952, the taxpayer corporation deducted accrued interest of $12,000 owing to O. H. Kruse. O. H. Kruse reported $6,000 interest from the taxpayer corporation in 1952. No interest was actually paid in 1952. (R. 31.)

In 1953, the taxpayer corporation deducted accrued interest of $12,000 owing to O. H. Kruse. O. H. Kruse reported $12,000 interest from the taxpayer corporation in 1953. The taxpayer corporation actually paid $2,000 interest in September 1953 to O. H. Kruse. (R. 31-32.)

The taxpayer corporation has never paid any dividends. (R. 141.)

Although the taxpayer corporation paid its obligations, other than this note, promptly, it made no

payment on the principal on this note until November 1955, after an Internal Revenue Agent questioned whether the note represented a bona fide indebtedness, thus raising the issue now on appeal. (R. 38.) Thereafter, payments on the principal were made in installments as follows (R. 32):

November 1, 1955	$100,000
April 12, 1957	20,000
October 22, 1958	80,000
	$200,000

The Commissioner disallowed the taxpayer corporation's deductions in the amount of $12,000 for each of the years 1952 and 1953 as interest expense on the ground that no indebtedness existed within the meaning of Section 23(b) of the Internal Revenue Code of 1939 and also on the ground that these amounts were not paid during the taxable years 1952 and 1953 or within 2½ months following the close of the taxable years, pursuant to the provisions of Section 24(c) of the Internal Revenue Code of 1939. (R. 32.)

The Tax Court found as an ultimate fact that the taxpayer corporation's note of June 15, 1950, payable to Otto H. Kruse in the sum of $200,000, was not a bona fide indebtedness and that interest accrued thereon in 1952 and 1953 was not deductible. The Tax Court found it unnecessary to rule on the Commissioner's alternate contention under Section 24(c) in view of the ruling in favor of the Commissioner under Section 23(b). (R. 32.)

SUMMARY OF ARGUMENT

The question presented on this appeal is whether the taxpayer corporation is entitled to an interest deduction under Section 23(b) of the Internal Revenue Code of 1939 for amounts accrued by it as payable upon a note given to the owner of all its stock. Its resolution, in turn, depends on the answer to the narrow question whether the note actually represented a bona fide indebtedness or a capital investment in the corporation. No single characteristic determines the answer to this question, and the presence or absence of any particular factor is not controlling in itself. Thus, the taxpayer, in relying heavily on cases which have held a debt to exist despite the presence of a particular factor which usually indicates a capital investment, errs by failing to recognize that the case must be decided by weighing all the factors present.

An analysis of the record in this case shows a preponderance of factors indicating that in reality the claimed loan was a capital investment, while few earmarks of a loan are present. The note was a demand note and lacked a fixed maturity date on which the principal had to be repaid. The purported lender agreed to subordinate his loan to any loan made to the taxpayer by the Bank of America. Since the "lender" owned all of the stock of the taxpayer corporation, it was not reasonable to expect that he would enforce repayment of the loan if it would inconvenience the corporation. The note was unsecured. It was issued to obtain working capital and assets

essential to start the corporation in business. All of these factors together indicate that the funds advanced were intended to be placed at the risk of the business. In addition, though the transaction was cast in the *form* of a loan, it was not strictly accounted for as a loan. Thus, interest was accrued when it was not even due under the terms of the note; and when interest did become due and was accrued and deducted by the corporation, the "lender" failed to report it as income in his individual income tax return. Significantly, even though the corporation paid its other obligations promptly, it made no payments at all on the principal of this alleged loan for over four years, and then only after the validity of the indebtedness was questioned by an Internal Revenue Agent. The taxpayer proferred no business reason requiring the transaction in question to be considered a loan rather than a capital investment, other than stating that the note was issued in return for assets of the same value—a purpose, however, which could just as easily have been met by the issuance of stock as by executing a note. In this connection, although O. H. Kruse himself was the only one who might have been able to testify that a valid business purpose existed at the time of the transaction which made a loan necessary rather than a capital investment, he did not testify—a circumstance properly regarded by the Tax Court as giving rise to an inference adverse to the taxpayer's position. The taxpayer's treatment of the transaction in question as a loan rather than a capital investment appears to have had no purpose other than tax avoidance. In

this connection, it is not without significance that the taxpayer corporation did not declare or pay any dividends but only accrued an alleged interest obligation in favor of its sole stockholder.

In contrast to the abundant indicia of capital investment here, almost no characteristics of a loan are present. Indeed, the taxpayer's brief is devoted primarily to attempting to explain away the characteristics of an equity relationship; there is very little affirmative emphasis on the existence of a true debt relationship. About all that the taxpayer can say in support of its contention is that the transaction involved was formally designated a loan. This alone, however, is not sufficient; names and terminology used to describe a transaction are not controlling, and tax consequences will be determined by substance and not form. The taxpayer's contention that a loan is indicated because no voting rights were attached to the note is specious, since O. H. Kruse already controlled all voting rights in the corporation through his ownership of all the stock in the corporation.

The issue here must be decided by weighing all the factors present. The taxpayer has the burden of proof, and has failed to meet its burden. The evidence overwhelmingly supports the Commissioner's determination. In any event, the question presented is a factual one and the trial court's determination should not be disturbed unless clearly erroneous. Analysis of the record demonstrates that the Tax Court's decision was not clearly erroneous but was amply warranted.

ARGUMENT

The Tax Court Correctly Held That the Taxpayer Corporation Was Not Entitled To An Interest Deduction Because the Note Given By the Corporation To Its Stockholder Did Not Create a Bona Fide Indebtedness, and This Finding Is Not Clearly Erroneous But Is Fully Supported By the Record

The issue raised by this appeal is whether certain amounts accrued as interest payable by the taxpayer corporation upon a note given by it to the owner of all its stock may be deducted as interest under Section 23(b) of the Internal Revenue Code of 1939. Resolution of this issue, in turn, depends upon whether the note given by the corporation represented a bona fide indebtedness or whether, in reality, it reflected a capital investment in the corporation.

The difference between a debtor-creditor relationship and an investment relationship has been the subject of much litigation. The question has come up often when, as here, the inquiry is whether payments by a corporation should be regarded as interest or dividends; and also when the inquiry has been whether advances made to an unsuccessful corporation should be regarded as bad debts or capital losses. Extended citation of the many cases in this area of tax law would serve no purpose since, as this Court and others have recognized, each case necessarily turns on its own particular facts. *Washmont Corp.* v. *Hendricksen*, 137 F. 2d 306 (C.A. 9th); *Commissioner* v. *Proctor Shop, Inc.*, 82 F. 2d 792, 794 (C.A. 9th); *Gooding Amusement Co.* v. *Commissioner*, 236 F. 2d 159, 165 (C.A. 6th). The decided cases, how-

ever, do offer certain valuable guides in determining whether a debt or an equity relationship exists. No single test is controlling and the presence or absence of any particular factor is not determinative *per se*. As the Supreme Court said in *John Kelley Co.* v. *Commissioner*, 326 U.S. 521, 530:

> There is no one characteristic * * * which can be said to be decisive in the determination of whether the obligations are risk investments in the corporations or debts.

See also, e.g., *Arlington Park Jockey Club* v. *Sauber*, 262 F. 2d 902, 905 (C.A. 7th); *Gilbert* v. *Commissioner*, 262 F. 2d 512, 514 (C.A. 2d); *Crawford Drug Stores* v. *Commissioner*, 220 F. 2d 292, 295 (C.A. 10th). Thus we think the taxpayer here erroneously emphasizes cases which have held a debt to exist despite the presence of a certain factor which usually indicates a capital investment. As indicated in *Kelley*, *supra*, and other cases, whether a debt or a capital investment exists can be properly determined only by considering *all* factors present, or, as the Tax Court here decided, "upon the whole record". (R. 38.)

Turning to the note at issue in this case, we find numerous characteristics supporting the premise of capital investment, and a paucity of factors pointing to a debt relationship. For example, one of the fundamental characteristics of a debt is a definite maturity date on which the principal must be repaid. *Pocatello Coca-Cola Bottling Co.* v. *United States*, 139 F. Supp. 912 (Idaho), citing *Elko Lamoille Power*

Co. v. *Commissioner*, 50 F. 2d 595 (C.A. 9th), and *Commissioner* v. *Proctor Shop*, 82 F. 2d 792 (C.A. 9th); *Parisian, Inc.* v. *Commissioner*, 131 F. 2d 394 (C.A. 5th).[1] The note here is clearly a demand note without a fixed and unqualified maturity date for repayment of the principal. According to its terms, it was payable "on or before December 31, 1950 or thereafter on demand". (R. 30.) The Tax Court correctly characterized it as "a demand note with no right to make demand for about the first six months and the right to fix the maturity date by demand after December 31, 1950".[2] (R. 35.)

Another significant element present here is the agreement signed by O. H. Kruse and his wife to subordinate all claims under the note in question to any loan made by the Bank of America to the corporation. (R. 31.) As was said in *Brinker* v. *United States*, 116 F. Supp. 294, 298 (N.D.Calif.), affirmed *per curiam* by this Court, 221 F. 2d 478:

> When an outside creditor is given complete priority over advances made it is practically an admission that the advances were considered capital advances.

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[1] However, even the presence of a fixed maturity date will not prevent an advance from being a capital investment rather than a loan if other factors indicate the former as its true nature. *Pacific Southwest R. Co.* v. *Commissioner*, 128 F. 2d 815 (C.A. 9th); *Commissioner* v. *Meridian & Thirteenth R. Co.*, 132 F. 2d 182, 187-188 (C.A. 7th).

[2] In fact, no demand for payment and no payment was made until some four years later, in November 1955, after an Internal Revenue Agent questioned whether this note represented a genuine indebtedness. (R. 38.)

The taxpayer suggests (Br. 20) that it is a usual "practice for a bank to require such an agreement in the case of an unsecured loan". This same argument was fully considered in *Sarkes Tarzian, Inc.* v. *United States*, 240 F. 2d 467 (C.A. 7th), and rejected in the following language (p. 470):

> On the question of subordination plaintiff argues that this is a common practice among commercial banks dealing with young and still insecure business organizations, and that subordination is not evidence of an equity investment if all essential rights of the creditor are preserved although postponed. *But subordination necessarily destroys one of the essential rights of the creditor, and the willingness to subordinate is indicative of equity investment.* (Italics supplied.)

The subordination agreement and the lack of a fixed maturity date evince a willingness to place the money at the risk of the business, the essence of a capital investment. As this Court said in *Root* v. *Commissioner*, 220 F. 2d 240, 241:

> A good statement of the distinction between an individual's advances to a corporation as creditor and his advances to a corporation as stockholder is to be found in the decision of the Seventh Circuit in *Commissioner of Internal Revenue* v. *Meridian & Thirteenth Realty Co.*, 132 F. 2d 182, 196, to the following effect: "It is often said that the essential difference between a creditor and a stockholder is that the latter intends to make an investment and take the risks of the venture, while the former seeks a definite obligation, payable in any event."

See also *Gilbert* v. *Commissioner*, 248 F. 2d 399 (C. A. 2d). The fact that Kruse owned all the issued stock of the taxpayer corporation—and could hardly be expected to demand payment of the note by the corporation if such payment would in any way economically inconvenience the corporation—is further indication that he intended to accept the risks of the business. Such lack of intent to enforce payment has been regarded as a feature of an equity, rather than a debt, relationship, since it shows that the obligation was not "payable in any event". *Gooding Amusement Co.* v. *Commissioner*, 23 T. C. 408, 418-419, affirmed, 236 F. 2d 159 (C. A. 6th), certiorari denied, 352 U. S. 1031; *Dobkin* v. *Commissioner*, 15 T. C. 31, 34. The fact that the note was unsecured (R. 38) also indicates a certain willingness to accept the risks of the business. In addition, the minutes of the corporation show that the note was issued by the corporation to obtain working capital (R. 29); and advances for working capital or for assets essential to start a corporation in business indicate capital investment rather than loan. *Schnitzer* v. *Commissioner*, 13 T. C. 43, affirmed per curiam, 183 F. 2d 70 (C. A. 9th), certiorari denied, 340 U. S. 911.

Although the taxpayer relies heavily upon the fact that the transaction here involved was cast in the *form* of a loan, and that a standard note form was used to evidence the transaction, yet the taxpayer's subsequent treatment of this note does not indicate that the parties regarded it as a loan requiring fixed interest and repayment of the principal. The inter-

est was not accounted for as required by the terms of the note. Interest was accrued when it was not even due (1951), and when it did become due and was accrued and deducted by the corporation, it was not reported as income by O. H. Kruse in his individual tax return (1952). (R. 36-37.) Moreover, even though the corporation paid its other obligations promptly, it made no payments at all on the principal of the alleged loan for over four years—and then only after the validity of the indebtedness was questioned by an Internal Revenue Agent. (R. 38.)

Yet another factor tipping the scales in favor of a capital investment, rather than a loan, determination is the lack of any showing of a valid business purpose requiring the transaction at issue to be treated as a loan. Cf. *Gregory* v. *Helvering*, 293 U. S. 465. The only business purpose the taxpayer is able to advance (Br. 12) is that the note was issued for assets having a value equal to the principal amount of the note. However, this is hardly a business purpose *requiring*, or justifying, the loan label, since stock would just as well have been issued to O. H. Kruse for his contribution of the assets. The failure to establish a valid business purpose has been considered of consequence in rejecting the loan hypothesis. *Talbot Mills* v. *Commissioner*, 3 T. C. 95, affirmed, 146 F. 2d 809 (C. A. 1st), affirmed, 326 U. S. 521; *Mullin Building Corp.* v. *Commissioner*, 9 T. C. 350, affirmed, 156 F. 2d 1001 (C. A. 3d); *Schneider Lumber Co.* v. *Commissioner*, decided January 30, 1956 (1956 P-H T. C. Memorandum Decisions, par. 56,025); *Crabtree* v. *Commissioner*, 22 T. C. 61, affirmed *per curiam*, 221

F. 2d 807 (C. A. 2d). In this connection, the Tax Court noted that O. H. Kruse, the only one who might have known of a business purpose, did not testify—a failure which, in the court's view, properly gave rise to an inference adverse to the taxpayer. Cf. *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 52; *Shaw* v. *Commissioner*, 252 F. 2d 681 (C. A. 6th).

The record in this case discloses no compelling reason for the taxpayer's designation of the transaction here involved as a loan, other than tax avoidance. In this connection we think it significant, as did the Tax Court, that the corporation did not declare or pay any dividends. (R. 141.) See *Crabtree* v. *Commissioner*, 22 T. C. 61, affirmed *per curiam*, 221 F. 2d 807 (C.A. 2d).

Against the abundant indicia of capital investment, the signs of a loan are scant. Indeed, the taxpayer's brief is devoted primarily to explaining away the abundant earmarks of a capital investment present here; there is little affirmative discussion to show that a debt existed. About all that the taxpayer is able to say in support of its loan premise is that the transaction involved was formally called a loan. A note was issued which was called a note, and the transaction was recorded as a loan on the books of the corporation. But such formalistic designation alone is not sufficient; the terminology used to describe a transaction is not controlling. *John Kelley Co.* v. *Commissioner*, 326 U. S. 521, 530; *Commissioner* v. *Proctor Shop, Inc.*, 82 F. 2d 792, 794 (C. A. 9th); *Brown-Rogers-Dixson Co.* v. *Commissioner*, 133

F. 2d 347, 349 (C. A. 4th); *John Wanamaker Philadelphia* v. *Commissioner*, 139 F. 2d 644, 646 (C. A. 3d); *Parisian, Inc.* v. *Commissioner*, 131 F. 2d 394 (C. A. 5th); *Gilbert* v. *Commissioner*, 248 F. 2d 399, 402 (C. A. 2d). Moreover, any one attempting to disguise a capital investment as a loan solely for tax purposes would very likely designate the transaction as a debt in every formal way possible; but, of course, the tax consequences of the transaction will be determined by its substance, not its form. The taxpayer also contends (Br. 15) that the note's lack of voting rights supports the loan premise, but this argument is specious; O. H. Kruse already controlled all voting rights in the corporation through his ownership of all the stock in the corporation.

As stated above, the proper resolution of the issue at hand depends, not upon any one, but upon a weighing of all factors present, and a consideration of the substance of the transaction. The burden of proof on this issue was on the taxpayer. *Arlington Park Jockey Club* v. *Sauber*, 262 F. 2d 902, 905 (C. A. 7th); *Wetterau Grocer Co.* v. *Commissioner*, 179 F. 2d 158, 160 (C. A. 8th); *First Mortgage Corp.* v. *Commissioner*, 135 F. 2d 121, 124 (C. A. 3d).

Moreover, this Court, as well as others, has often held that the precise question presented here is a question of fact and that the trial court's determination will not be disturbed unless clearly erroneous. See, e.g., *Earle* v. *W. J. Jones & Son*, 200 F. 2d 846, 847 (C. A. 9th); *Grace Bros.* v. *Commissioner*, 173 F. 2d 170 (C. A. 9th); *Root* v. *Commissioner*, 220 F. 240 (C. A. 9th); *Cohen* v. *Commissioner*, 148 F. 2d

336 (C. A. 2d). In *Earle* v. *W. J. Jones & Son*, *supra*, this Court said (pp. 847-848):

> And we should be reluctant to disturb the finding of the trial court where, as here, the question whether the advances gave rise to debts or to a proprietary interest depends upon the determinative *intent* of the parties to the critical advances.

The taxpayer has failed to demonstrate that the Tax Court's decision was clearly erroneous, and there is no reason why this Court should overcome its stated reluctance to reverse an ultimate factual finding of the court below which was fully supported by the record.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

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MARCH, 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960 543309 1185

No. 16,671

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE NAVAL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Codes

Regulations

No. 16,671

IN THE

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GEORGE NAVAL,
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BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291. On September 30, 1959, an indictment in three counts was returned by the Grand Jury of the Northern District of California, Southern Division, charging the appellant with three violations of Title 21, Section 174. The appellant pleaded not guilty and demanded a jury trial. After the jury trial, in which appellant presented no evidence, he was convicted and sentenced to 5 years on each count, the sentences to run concurrently. A notice of appeal was thereafter filed.

STATEMENT OF FACTS.

Appellant's statement of facts is substantially correct. In short, Narcotic Agents of the Federal Treas-

ury Department on three occasions arranged to have an informant by the name of David Poggi searched. On each occasion no narcotics were found on Poggi's person and he was given certain amounts of money. He was then followed and watched while he spoke with the appellant in appellant's car. Immediately after each meeting Poggi returned to the Narcotic Agents where he surrendered a number of capsules which contained a whitish powder, subsequently established to contain heroin. Furthermore, Poggi no longer had the money on his person.

QUESTIONS PRESENTED.

1. Was the evidence sufficient to sustain the conviction?

2. Was reversible error committed in the denial of a Bill of Particulars?

3. Was reversible error committed in admitting certain evidence involving a telephone conversation?

4. Did the judge's instructions on circumstantial evidence constitute reversible error?

ARGUMENT.

I. THE PROSECUTION'S EVIDENCE WAS SUFFICIENT TO CONVICT.

At the outset it should be remembered, in reviewing this case, that this Court is not passing on

the question of whether the Government has proved to its satisfaction beyond a reasonable doubt the guilt of the appellant upon the three counts. The jury who heard the witnesses has determined that, and it is for this Court merely to decide whether there was sufficient evidence so that a reasonable jury could conclude as this jury did. The Government submits that the evidence here is ample to sustain that burden.

It is a well established principle that this Court will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to to the prosecution.

Henderson v. United States, 143 F. 2d 681 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th);

Bell v. United States, 185 F. 2d 302, 308 (C.A. 4th);

Gendelman v. United States, 191 F. 2d 993 (C.A. 9th);

Barcott v. United States, 169 F. 2d 929, 931 (C.A. 9th) certiorari denied 336 U.S. 912.

The proof in a criminal case need not exclude all possible doubt, but need go no further than reach that degree of probability where the general experience of

men suggests that it is past the mark of reasonable doubt.

Henderson v. United States, 143 F. 2d 681 (C. A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th).

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue.

Wigmore on Evidence (3d ed. 1940), Vol. IX, Sec. 2497, p. 324.

An appellate Court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the jury.

Gage v. United States, 167 F. 2d 122, 124 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 254;

Gendelman v. United States, 191 F. 2d 993 (C. A. 9th);

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (C.A. 9th).

Certainly the Government's proof, although circumstantial, is most compelling. Poggi did not have nar-

cotics before he entered the car of the appellant and he did have narcotics after he emerged. Therefore, the inference is not only permissible, but inescapable, that Poggi got the narcotics from the appellant or from under his control. This evidence, especially unrebutted, not only supports a finding of guilty beyond a reasonable doubt, but compels it. See *Macaboy v. United States,* 160 F. 2d 279 (D.C. Cir. 1947); *Quong v. United States,* 160 F. 2d 251 (D.C. Cir. 1947); *Higgins v. United States,* 160 F. 2d 222 (D.C. Cir. 1947). See also *United States v. Pinna,* 229 F. 2d 216 (7th Cir. 1956); *Bunn v. United States,* 260 F. 2d 313; *United States v. Gernie,* 252 F. 2d 664 (2d Cir. 1958).

II. APPELLANT HAS WAIVED ANY POSSIBLE ERROR IN THE DENIAL OF HIS BILL OF PARTICULARS.

Even assuming that the judge would have abused his discretion in denying a properly made motion for a bill of particulars as to the identity of David Poggi, an examination of the transcript in the above case indicates that any error here was waived. Appellant's counsel below stated:

> ". . . [W]e are not entitled to the name of the informer provided he is going to be a witness. I think we are entitled to know that—if they are not going to call him as a witness. The cases show that we are entitled to his name." (Tr. vol. II, part I, pp. 2-3.)

Mr. Riordan, who, the record indicates, did not try this case, then stated, "I don't know who my witnesses

are," and nothing further was said by the appellant's attorney. If there were any error in the refusal of this information at that time, appellant has waived it first by stating that he was not entitled to the information unless the informant was not used as a witness, and secondly, by letting the matter drop without attempting either to force some type of an election from the Government or requiring one more familiar with the case to make a statement.

Furthermore, in the Government's opening statement delivered by Mr. Petrie (Tr. vol. 2, page 4) the name of the informer was given. At no time after this did appellant's counsel ask for a continuance in order to find the informant or to otherwise make any preparation to meet the testimony. In view of this, there is not the slightest hint of any prejudice from the denial of the requested information before trial.

III. THE TELEPHONE CONVERSATION COMPLAINED OF WAS ADMISSIBLE.

The telephone conversation complained of was admitted over appellant's objection that the voice of the appellant was improperly identified. First of all, there is evidence to support the identification of the voice as the appellant's. In the conversation Poggi stated that he was at his house and asked, "Would you honk when you come by?" The unidentified voice said, "Yes . . . I will be by in about 15 minutes." Approximately half an hour thereafter, (Tr. page 42) the appellant in his car appeared in front of Poggi's

house and honked its horn. This is sufficient identification to allow the conversation properly to be admitted since a reasonable, though circumstantial, inference from the foregoing was that the conversation was with appellant. Any other alternatives would go to the weight of the identification, not its admissibility. *Wach v. U. S.,* 212 F. 2d 520, 525 (8th Cir. 1954); *Morton v. U. S.,* 60 F. 2d 696 (7th Cir. 1932); *Ottida, et al. v. Harriman National Bank,* 24 N.Y.S. 2d 63 (1940).

Secondly, this conversation was admitted on the statement of Assistant United States Attorney Petrie that (Tr. vol. II, p. 38a) it would be connected up with the defendant. If it were not connected up with the defendant it would be subject to a motion to strike. The record, however, indicates that no such motion to strike was made at the end of the Government's case and therefore, any error in the admissibility of this evidence was waived.

Lastly, a reading of this conversation shows it to have been completely non-prejudicial. The only possible reference to narcotics in the conversation was, "Yes, how many" stated by the unidentified voice and Poggi's reply of "ten". On their face these words do not appear to refer to narcotics and if such a construction was placed upon them by the jury, another factor of identification of the unidentified voice would be present since the evidence showed that Poggi received ten capsules of heroin from the appellant.

IV. THE JUDGE'S INSTRUCTION WAS CORRECT.

Appellant's last claim of error is in the judge's instruction on circumstantial evidence. A reading of this instruction (pages 178-179) shows it is full, complete, and fair to the defendant. See *Holland v. United States,* 348 U.S. 121, 140. The judge stated, "Each fact essential to complete a chain of circumstances should be shown which is not only consistent with the guilt of the defendant," rather the guilt of the defendant on all of the evidence had to be established to the satisfaction of the jury beyond a reasonable doubt. Although the Court's idiomatic use of the word "only" for "merely" may not be commended by grammarians, there is no doubt that the jury could not have been misled by this to the appellant's detriment. As *Holland v. United States,* supra, indicates, this instruction was not only not reversible error but an extremely fair and perceptive instruction.

Dated, San Francisco, California,
March 10, 1960.

Respectfully submitted,

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